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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Joe John Rodriguez

Petitioner

vs.

Wayne W. Farrell, and Lois Szczepanski

On Petition for Writ of Certiorari
To the United States Court of Appeals for
the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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59 pp

Questions Presented For Review

Is Eleventh Circuit precedent which holds that continued painful handcuffing, of a non-threatening and compliant suspect is not excessive force (even where other alternatives are readily available) simply because Eleventh Circuit precedent holds that the infliction of pain, even if substantial, is not excessive force unless it can be expected to render a serious injury?

Does an officer act in an "objectively reasonable" manner entitling him to qualified immunity as a matter of law, where he handcuffs a compliant and non-threatening suspect behind his back using a "pain compliance" technique where the officer is also aware the suspect was recently released from the hospital due to a serious accident, confirms such hospitalization by briefly reviewing the hospital records and prescriptions carried by the suspect, is warned to "be careful" about the suspect's arm, has departmental regulations that allow handcuffing in the front or not at all to an injured suspect, and upon handcuffing observes the suspect fall down to his knees screaming in obvious pain that his arm is being injured – combined with the fact that the result of such handcuffing is injury to a key healing bone fragment that results in twenty five operations and the eventual amputation of the arm?

Is the continued handcuffing of a non-resistive and compliant suspect behind his back "objectively reasonable", entitling the officer to qualified immunity, where it is obvious that the handcuffing

is causing uncommon and severe pain to the suspect, the officer is on notice that the suspect was recently released from the hospital involving a serious injury, and other methods of securing the suspect are readily available?

Is the decision of the Eleventh Circuit Court of Appeals in the current case in conflict with the decisions of other Circuit Courts of Appeal in Walton v. City of Southfield, 995 F.2d 1331 (6th Cir 1993); Grooms v. Dockter, 76 F.3d 378 (6th Cir. 1996); Martin v. Heideman, 106 F.3d 1308 (6th Cir. 1997); Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001); Guite v. Wright, 147 F.3d 747 (8th Cir. 1998); Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989); Heitschmidt v. City of Houston, 161 F.3d 834 (5th Cir. 1998); Williams v. Bramer, 186 F.3d 633 (5th Cir. 1999); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); Hansen v. Black, 885 F.2d 642 (9th Cir. 1989); LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000); Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999); and Bastien v. Goddard, 279 F.3d 10 (1st Cir. 2002), as well as the decision in Graham v. Connor, 490 U.S. 386 (1989)?

Listing of Parties

The parties before the Circuit Court of Appeals for the Eleventh Circuit were Wayne W. Farrell, and Lois Szczepanski (Appellants below), and the Petitioner in this Court, Joe John Rodriguez (Appellee below). This petition concerns only the actions of the Respondent, Wayne W. Farrell, on the excessive force issue.

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Statement Regarding Jurisdiction

The case as originally filed included state court claims for false arrest, and federal claims pursuant to 42 U.S.C. 1983 for violations of the constitutional rights of Mr. Rodriguez under the Fourth Amendment for arrest without probable cause, and the use of excessive force. The Complaint was filed in the Orange County, Florida, Circuit Court, and was removed by the Defendants/Respondents pursuant to 28 U.S.C. 1441 to the United States District Court for the Middle District of Florida, District Court Docket Number 98-00997-CV-ORL-19A

The Defendants, Farrell and Szczepanski, who were the police officers involved in the arrest and detention of the Petitioner, Mr. Rodriguez, moved for summary judgment before the District Court on the basis of qualified immunity, which motion was denied by the District Court Judge on June 7, 2000. An interlocutory appeal was thereafter timely taken by Mr. Farrell and Ms. Szczepanski to the United States Court of Appeals for the Eleventh Circuit, Docket Number 00-13147.

On January 30, 2002, the Eleventh Circuit, in an opinion authored by the Hon. J.L. Edmondson, overturned the District Court's order, finding that both police officers were entitled to qualified immunity on the probable cause issue, and further found that Mr. Farrell was entitled to qualified immunity on the excessive force issue.[1] Judgment was entered by the Eleventh Circuit accordingly on that same day, January 30, 2002.

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[1] Ms. Szczepanski was not involved in the excessive force issue.

A timely petition for rehearing was thereupon filed by Mr. Rodriguez, and was denied with opinion on June 17, 2002. The opinions of the United States Circuit Court of Appeals are found at: Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002); reh. denied with opinion, 294 F.3d 1276 (11th Cir. 2002)

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

Statement of the Relevant Facts

On September 8 1995, at the time of 12:10 a.m., a vehicle in which the Petitioner, Joe John Rodriguez, was riding in as a passenger was stopped by a police officer for having an unlit tag light. The only other occupant was its female driver. The officer was accompanied by an un-uniformed male, and also had her canine in the back of her unit. She called for a backup, and another officer, Sgt. Farrell arrived to assist.

While sitting in the front passenger seat Mr. Rodriguez had his left arm in a sling resting on a pillow. He was asked to exit the vehicle by the first officer, and took off the sling before exiting. Sgt. Farrell was standing behind the vehicle during this period in his backup capacity. After Mr. Rodriguez exited the vehicle the first officer conducted a voluntary search of the driver, and found drugs in her purse. The driver was arrested without incident, and placed in the back of Sgt. Farrell's unit.

Critical to the issues before this Court, Mr. Rodriguez had been recently released from the hospital after a serious motorcycle accident for life-threatening injuries. His left elbow had been shattered, had undergone extensive surgery, and was kept in place by bone plates and surgical screws. Other than the sling, the injury would not have been obvious to sight as Mr. Rodriguez was wearing a long sleeved shirt that hid the surgical scars, and extensive bandaging.

After the arrest and placement of the female driver in the back of his unit, Sgt. Farrell asked Mr. Rodriguez for identification, and at that time

was told by the Petitioner that he had recently been released from the hospital due to a motorcycle accident, and was still taking medication because of it. Sgt. Farrell located the medications in marked prescription bottles, and lined them up on the trunk of the vehicle. He then briefly looked through some of the hospital records from the accident which the Petitioner had with him. During the entire time, Mr. Rodriguez was cooperative, and non-resistant.

Sgt. Farrell decided to do a "warrants check" on Mr. Rodriguez, and called dispatch. Although a female dispatcher announced "Rodriguez, no wants or warrants" based on a check of his driver's license, another dispatcher later came back with an "alias" hit for a "Victor Manuel Heredia" who used an alias of Joe Rodriguez. Mr. Heredia had an six year old outstanding warrant for possession of cocaine, and two traffic matters. The warrants carried a combined bond of five thousand five hundred dollars. Although Mr. Rodriguez had extensive, if not extraordinary identifications proving who he was, and although there were significant discrepancies in the physical identifications of the wanted person, Sgt. Farrell decided to arrest Mr. Rodriguez as "Victor Heredia", and did so prior to any attempt to confirm the warrant. No effort was made to warn the Petitioner he was about to be arrested, and the first he knew of it was when Sgt. Farrell grabbed his left arm, and began twisting it behind his back. The arrest occurred at 12:40 a.m., thirty minutes after the initial stop of the vehicle.

In making the arrest, Sgt. Farrell grabbed the Petitioner's left arm, and twisted it as high as he could on the Petitioner's back to just below the shoulder blade in a "pain compliance maneuver". According to Sgt. Farrell's deposition, Mr. Rodriguez had asked him to "be careful" of his arm immediately prior to the handcuffing. At the point when the arm was twisted behind him, Mr. Rodriguez fell to his knees screaming in pain that Sgt. Farrell was "hurting" his arm. Rather than stop, or ask Mr. Rodriguez what the problem was, Sgt. Farrell completed the handcuffing process, and placed Mr. Rodriguez in his police vehicle, handcuffed behind his back. While in the back of the unit the Plaintiff continued to complain about severe pain, while grunting and moaning constantly. The Petitioner was then transported to the police station, and placed in a holding cell where the handcuffs were removed. The time that Mr. Rodriguez was cuffed was approximately fifteen minutes.

The deposition of the Petitioner's surgeon established that the handcuffing displaced a key bone fragment that led to an infection, twenty five operations, and the eventual amputation of Mr. Rodriguez's left arm. The surgeon also testified that handcuffing the Petitioner behind his back would have been "a very serious, painful event". It is significant to note that the regulations of Sgt. Farrell's police department permitted an officer to handcuff an injured suspect in the front, or not at all.[2]

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[2] Appendix, infra.

The Petitioner sued Sgt. Farrell[3] in the United States District Court for the Middle District of Florida for the use of excessive force pursuant to 42 U.S.C. 1983, under the Fourth Amendment. Sgt. Farrell sought summary judgment on the excessive force issue on the basis of "qualified immunity".

The District Court denied qualified immunity in a written order, finding the material facts to be in controversy, and Sgt. Farrell took an interlocutory appeal to the Eleventh Circuit Court of Appeals, which reversed the District Court, finding that qualified immunity on the excessive force issue should have been granted.

Mr. Rodriguez had argued both before the District Court, and Eleventh Circuit that the excessive force issue was in two primary parts. The first was whether Sgt. Farrell acted in an objectively reasonable manner, in the first instance, by handcuffing the Petitioner behind his back, and using a pain compliance maneuver, as he was "on notice" that the Petitioner was recovering from serious injuries. The second issue was whether Sgt. Farrell acted in an objectively reasonable manner in continuing the handcuffing when it should have been obvious that it was causing the Petitioner extreme and unusual pain, especially as other less-painful restraint alternatives were available. In analyzing this issue the Petitioner pointed out that he continued to be cooperative

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[3] The suit in the District Court also involved claims under the Fourth Amendment against both officers for arrest without probable cause, and a state law claim against the municipality for common law false arrest.

throughout his ordeal, and there were at least two other persons available to assist Sgt. Farrell, plus a police dog. It is also significant that Petitioner's expert had testified in deposition that the conduct of Sgt. Farrell was not objectively reasonable.

Argument in Support of Petition

A line of cases from other Circuit Court's of Appeal existing prior to the decision in this case had held that handcuffing, under certain circumstances, could sustain a constitutional injury for excessive force. Hansen v. Black, 885 F.2d 642 (9th Cir. 1989)("rough handcuffing"); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993)(tight cuffing with refusal to loosen); LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000)(tight handcuffs which cut-off circulation); Walton v. City of Southfield, 995 F.2d 1331 (6th Cir 1993)(obvious pain with plea not to handcuff behind back as shoulder was injured); Martin v. Heideman, 106 F.3d 1308 (6th Cir. 1997)(refusal to loosen tight cuffs where complained hands were numb); Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001)(refusal to loosen cuffs that were too tight and injuring wrists); Grooms v. Dockter, 1996 U.S. App. LEXIS 3444, 76 F.3d 378 (6th Cir. 1996)(tight handcuffing with refusal to loosen causing suspect to cry in visible and continued pain); Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989)(tight handcuffing that broke skin and left scars); Heitschmidt v. City of Houston, 161 F.3d 834 (5th Cir. 1998)(tight handcuffing causing severe pain

left on for hours without loosening); Williams v. Bramer, 186 F.3d 633 (5th Cir. 1999)(handcuff behind back after being warned by doctor and suspect of possible severe injury if did so); Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999)(painful handcuffing combined with other injuries); Guite v. Wright, 147 F.3d 747 (8th Cir. 1998)(non-handcuff case where police were told suspect recovering from surgery to shoulder, and grabbed, pushed, and held against door such to reinjure it) Bastien v. Goddard, 279 F.3d 10 (1st Cir. 2002)(painful handcuffing with refusal to loosen). See also, Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) (handcuffing behind back of severely injured suspect not a reasonable method of restraint and excessive force).

The Petitioner believes these cases form a "consensus" from which an officer would be placed on "fair warning" that painful handcuffing continued on a non-resistive suspect who complains of injury or severe pain is not constitutionally acceptable where alternatives are readily available,[4] and especially where the handcuffing aggravates a pre-existing injury disclosed to the officer. See, Hope v. Peltzer, __U.S. ___, 122 S. Ct. 2508, 2515-2516, 153 L. Ed. 2d 666 (2002)("fair warning" is all that is necessary).

In the instant case,, the Eleventh Circuit did not agree with this concept, and held that the

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4. Alternatives according to the expert included using two pairs of cuffs joined together; cuff in the front; cuff each hand to belt; or no cuffs at all. See also, Winter Park Police Dept. Procedure, 106-12. Appendix, infra.

handcuffing technique used by Sgt. Farrell "is a relatively common and ordinarily accepted non-excessive way to detain an arrestee", and it was only because his "earlier surgery made what otherwise would be a common non-excessive handcuffing technique a maneuver that caused severe injury and tragic results." Rodriguez, at 230 F.3d , 1351. In so stating, the Eleventh Circuit held that "painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal", and further noted that: "In the Eleventh Circuit, we recognize that the typical arrest involves some force and injury." Rodriguez, supra at 1351 (emphasis added). The Eleventh then concluded, contrary to the findings of the District Court, and the deposition of Plaintiff's police procedures expert, that Sgt. Farrell was not on notice that his actions in handcuffing Mr. Rodriguez behind his back could cause any injury other than temporary pain.

On rehearing the Eleventh Circuit addressed an allegation that it had overlooked the argument that the "continued handcuffing" of Mr. Rodriguez, behind his back, was objectively unreasonable due to clear indications of substantial pain, and the Petitioner's protestations that his arm was being injured. In dismissing that argument, the Eleventh Circuit stated that Sgt. Farrell was under no obligation to give credence to Mr. Rodriguez statements of pain or injury, and that similar false claims were frequently made, and were: "no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all and, if they must be restrained in that manner, would prefer that the handcuffs be in front."

Rodriguez, at 294 F.3d, 1278. The court, in footnote 3, then went on to state that had Mr. Rodriguez told Sgt. Farrell his arm was injured prior to the arrest, the court would have been "more inclined" to conclude that the Constitution required Sgt. Farrell to credit it.

Your Petitioner respectfully believes that the Eleventh Circuit used an incorrect an unacceptable standard in reversing the denial of summary judgment by the District Court on this issue, and that standard conflicts with the cases previously cited in this petition from other Circuits. The standard used by the Eleventh Circuit is that painful handcuffing, even where continued after an arrest, is an acceptable procedure, even if it is unnecessary, and easily corrected – even if done to a non-resistant and non-dangerous subject, so long as the officer could have believed that no serious injury would result in the typical case.

A further extension of the holding, as amplified in the rehearing, is that unless an officer is informed prior to an arrest that a suspect has a serious pre-existing injury, and is also informed of the exact location of the injury – the officer need not give credence to any later claims of injury by the suspect, and may constitutionally ignore such claims even where manifestations of severe pain are apparent.

In essence, the approach of the Eleventh Circuit gives an officer a right to act in a torturous, and deliberately ignorant manner if the technique used would not ordinarily result in a serious injury, despite any contra-indications he observed or became aware of. More importantly, the officer's decision to take steps to alleviate the

pain need not be based on any objective reason, or legitimate police concern, but can be based on mere indifference, as pain alone, however intense, is not constitutionally protected in the Eleventh Circuit under the Fourth Amendment.

Thus, the fact that the Petitioner fell to his knees in this case, screaming in pain that his arm was being injured, could constitutionally be overlooked even though the officer had briefly looked at the Petitioner's hospital records and prescriptions – simply because Mr. Rodriguez failed to inform the officer of the exact nature of his injury prior to the arrest, even though he was unaware he was going to be arrested.

It appears the precedent of the Eleventh Circuit is also in conflict with the precedent of this Court in Graham v. Connor, 490 U.S. 386, 396 (1989), where a detainee who claimed to be diabetic and suffering from low blood sugar was tightly handcuffed, and thrown headfirst into the side of a police car - thus suffering injuries both to his wrists, head and shoulders. This Court held that in determining objective reasonableness the test that was to be applied included consideration of the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

The Petitioner respectfully submits that the decision of the Eleventh Circuit conflicts with the Graham case, supra, as the continued application of painful handcuffing to a non-threatening and compliant suspect – especially a suspect

recovering from surgery – would not appear to meet the threshold for the application of force required by Graham.

It is therefore, respectfully requested that certiorari be granted.

Respectfully submitted,

Jon H. Gutmacher, Esq.
Counsel for Petitioner

-- APPENDIX --
IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

JOE JOHN RODRIGUEZ, Plaintiff-Appellee, versus WAYNE W.FARRELL, LOIS SZCZEPANSKI, Defendants-Appellants.
No. 00-13147

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

280 F.3d 1341 (11th Cir. 2002); 2002 U.S. App. LEXIS 1423; 15 Fla. L. WeeklyFed. C 280

January 30, 2002, Decided
January 30, 2002, Filed

COUNSEL: For Wayne W. Farrell, Appellant: Jeffrey Arthur Rynor, Mitrani, Rynor & Gallegos, P.A., Miami, FL.

For Lois Szczepanski, Appellant: Jeffrey Arthur Rynor, Mitrani, Rynor & Gallegos, P.A., Miami, FL. Loren H. Cohen, Mitrani, Rynor, et al., Miami, FL.

For Joe John Rodriguez, Appellee: Jon H. Gutmacher, Attorney at Law, Orlando, FL.

JUDGES: Before EDMONDSON and RONEY, Circuit Judges, and JORDAN *, District Judge.

* Honorable Adalberto J. Jordan, U.S. District Judge for the Southern District of Florida, sitting by designation.

OPINION BY: EDMONDSON

OPINION: [*1343]

EDMONDSON, Circuit Judge:

This appeal is about an arrest, the Fourth Amendment, and mistaken identity. Joe John Rodriguez sued Sergeant Wayne Farrell ("Sgt. Farrell") and Officer Lorri Szczepanski ("Officer Szczepanski"), under *42 U.S.C. § 1983*, alleging that the police officers violated the Constitution when they mistakenly arrested him pursuant to a valid arrest warrant for another person. Sgt. Farrell and Officer Szczepanski, in their personal capacities, appeal the district court's denial of qualified immunity. We reverse.

FACTS n1

Footnotes- - - - - - - - - - - - - - - - - - -

n1 Because this appeal is from the denial of summary judgment, we must view the evidence in the light most favorable to the plaintiff. *Hudson v. Hall, 231 F.3d 1289, 1292 n.2 (11th Cir. 2000)*. "But, we stress that the 'facts' set out in this opinion--the 'facts' that we must assume for the purposes of this appeal--may turn out not to be the actual facts of this case."

Id.

-End Footnotes- - - - - - - - - - - - - - - - - - -

On 8 September 1995 at 12:10 a.m., Officer Szczepanski pulled over a vehicle driven by Patricia Foulkes ("Ms. Foulkes"): the vehicle had a broken tag light. Rodriguez was the only passenger in Ms. Foulkes's car. Shortly after the initial traffic stop, Sgt. Farrell arrived to provide backup.

Officer Szczepanski told Ms. Foulkes to get out of the car and then asked for her driver's license. After Ms. Foulkes said that her driver's license was in her purse which was in her car, Officer Szczepanski returned to the car and asked Rodriguez, who was seated in the car with his arm in a sling and resting on a pillow, n2 to hand her Ms. Foulkes's purse. After Rodriguez handed her Ms. Foulkes's purse, Officer Szczepanski directed Rodriguez to get out of the vehicle. Rodriguez complied and walked around freely beside the vehicle. But, before Rodriguez got out of the vehicle, he removed his sling. Because Rodriguez was wearing a long-sleeve shirt (after he had removed his sling), nothing outwardly indicated that Rodriguez's arm was injured.

Footnotes- - - - - - - - - - - - - - - - - - -

n2 Rodriguez had severely injured his arm in a motorcycle accident.

End Footnotes- - - - - - - - - - - - - - - - - - -
[**3]

Officer Szczepanski returned to Ms. Foulkes, found unlawful drugs (methamphetamine, as well as others) in her purse, and arrested her. Officer Szczepanski thereafter began to search Ms. Foulkes's car. Then, Sgt. Farrell -- who, to this point, had only been observing the situation from a position behind Ms. Foulkes's car n3 -- approached Rodriguez.

Footnotes- - - - - - - - - - - - - - - - - - -

n3 Rodriguez testified at his deposition that Sgt. Farrell was behind the car and that he could see the Sergeant in one of the car mirrors. Rodriguez also testified that the interior of the car was "dark."

End Footnotes- - - - - - - - - - - - - - - - - - -

Sgt. Farrell asked Rodriguez for identification. Rodriguez directed Sgt. Farrell's attention to a duffle bag, which contained more than ten pieces of identification, including Rodriguez's Florida driver's license, birth certificate, military discharge papers, social security card, credit card, and V.A. patient data card. n4 Sgt. Farrell, [*1344] after obtaining consent from Rodriguez, searched the duffle bag and removed the driver's license from the organizer that contained[**4] Rodriguez' identifications. During the search, Sgt. Farrell

noticed several prescription-drug bottles and questioned Rodriguez about their purpose. Rodriguez told the Sergeant that he had just gotten out of the hospital after a motorcycle wreck. Sgt. Farrell also briefly looked at a collection of hospital records n5 that were in the duffle bag.

Footnotes- - - - - - - - - - - - - - - - - - - -

n4 Rodriguez had this extraordinary collection of identifications with him to apply for benefits.

n5 Rodriguez testified at his deposition that he did not know the extent of these records. But, he believed that they were fewer than 100 pages, covered the motorcycle accident, and were for the purpose of applying for disability benefits.

End Footnotes- - - - - - - - - - - - - - - - - -

Sgt. Farrell called dispatch over his radio and ran a check on Rodriguez's driver's license information. The dispatcher responded, "no wants or warrants." Sgt. Farrell continued to talk with the dispatcher when a "name hit" was obtained on Rodriguez's name. Teletype communications to the dispatcher indicated that three warrants existed[**5] for a Victor Heredia who used the alias "Joe Rodriguez. " n6 Heredia was wanted by the St. Johns County, Florida Sheriff's Department for several charges, including possession of cocaine. n7 The

dispatcher relayed descriptive information from the warrant to Sgt. Farrell.
Footnotes- - - - - - - - - - - - - - - - - - -

n6 The warrant for Heredia was almost six years old.

n7 The other two charges were for unlawful use of a driver's license and driving with a license that was suspended or revoked.

End Footnotes- - - - - - - - - - - - - - - - - -

The following chart lists relevant descriptive information from the warrant that was available and the corresponding information for Rodriguez:

name	Victor Manuel Heredia aka Joe Rodriguez	Joe John Rodriguez
Sex	male	male
Race	white	white
Date/Birth	6/24/53 7/2/53 6/23/53 (multiple)	3/23/53
Place/Birth	New York	New York
SSN	112-42-9808 112-42-5808 112-43-9809	115-42-5388

Tattoos	4 tattoos; right forearm, left arm, right arm, back	6 tattoos; both biceps, both shoulder blades; both ankles (none right forearm)
Height	5'6"	5'11"
Weight	139 lbs.	180 lbs.
Hair color	brown	brown
eye color	green	brown
scar	Scar: forehead	no scar
Residence	St. Augustine, Florida	Apopka, Florida

After Sgt. Farrell received identifying information from the dispatcher, Sgt. Farrell [*1345] approached Rodriguez and questioned him about two of his physical characteristics: height and tattoos. Sgt. Farrell first asked Rodriguez his height. Rodriguez responded by claiming he was 5'11". Sgt. Farrell disagreed, stating: "No way, I'm 5'11", you're shorter than me." Rodriguez claims that Sgt. Farrell was standing on a curb when Farrell made this statement. Sgt. Farrell then focused on Rodriguez' tattoos. Convinced by the fact that Rodriguez had at least four tattoos (he had six) and that the locations of the first two identified by Rodriguez were in the locations listed in the warrant, Sgt. Farrell arrested Rodriguez on the Heredia warrant.

When Sgt. Farrell arrested Rodriguez, Sgt. Farrell grabbed Rodriguez' left arm, twisted it behind Rodriguez' back, and forced it up to just below the shoulder-blade. Rodriguez fell to the ground screaming in pain, telling Sgt. Farrell that he was hurting his arm. n8 Sgt. Farrell ignored Rodriguez' screams, completed the cuffing, and took Rodriguez to the station. After arriving at the station roughly 10 minutes later, Rodriguez was placed in a holding[**7] cell and his cuffs were removed.

Footnotes- - - - - - - - - - - - - - - - - - -

n8 Rodriguez testified at his deposition that he, before the arrest began, did not tell Sgt. Farrell that his arm was injured.

End Footnotes- - - - - - - - - - - - - - - -

DISCUSSION

"Qualified immunity protects government officials performing discretionary functions ... from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Alabama A&M Univ., Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994)* (en banc).

"Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." Id. Whether a defendant official has violated a constitutional

right at all is, of course, "a 'necessary concomitant' to the question of qualified immunity: if a defendant has not violated the law at all, he certainly has not violated clearly established[**8] law." *Hudson v. Hall, 231 F.3d 1289, 1294 (11th Cir. 2000)* (quoting *GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1366-67 (11th Cir. 1998)).*

A. The Arrest

1. Constitutional Violation

"A warrantless arrest without probable cause violates the Fourth Amendment and forms a basis for a section 1983 claim." *Ortega v. Christian, 85 F.3d 1521, 1525 (11th Cir. 1996).* We conclude that no violation occurred in this case. In reaching this conclusion, the Supreme Court's opinion in *Hill v. California, 401 U.S. 797, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971),* and various cases from the Seventh Circuit (as well as other circuits) guide our determination.

In *Hill v. California, 401 U.S. 797, 28 L. Ed. 2d 484, 91 S. Ct. 1106 (1971),* the Supreme Court determined, in a criminal case, whether the mistaken arrest of one person (for whom no probable cause to arrest existed) based upon the misidentification of that person as a second person (for whom probable cause to arrest existed) violated the Constitution. The Court concluded "no," writing that "when the police have probable cause to arrest one party, [**9] and when they reasonably mistake a second

party for the first party, then the [*1346]arrest of the second party is a valid arrest." *401 U.S. at 802* (alteration in original).

The same "reasonable mistake" standard applies (1) in the context of a section 1983 action and (2) when the police have a valid warrant -- as opposed to just probable cause -- to arrest someone, but mistakenly arrest someone else due to a misidentification. E.g., *White v. Olig, 56 F.3d 817, 820 (7th Cir. 1995)* (using Hill "reasonable mistake" standard in section 1983 case and determining that mistaken arrest pursuant to valid warrant was reasonable); cf. *Rodriguez v. Jones, 473 F.2d 599, 605-06 (5th Cir. 1973)* (concluding plaintiff could not recover, under section 1983, against officers who forcibly entered plaintiff's residence pursuant to mistaken belief that two fugitives named in arrest warrants were in residence because officers' mistaken belief was reasonable under the circumstances). See generally U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall[**10] not be violated.") (emphasis added). We must, therefore, determine as a legal matter whether Sgt. Farrell and Officer Szczepanski's mistaken arrest of Rodriguez -- pursuant to the execution, in the field, of a valid arrest warrant for Heredia -- was outside the scope of "reasonable mistakes."

The Eleventh Circuit has no precedents for what constitutes an unreasonable seizure due

to a mistaken identification and arrest under a valid warrant in the field. The Seventh Circuit, however, has addressed this problem in several opinions: their discussions guide us today. n9 In *Johnson v. Miller, 680 F.2d 39, 42 (7th Cir. 1982),* the court concluded, as a matter of law, that a police officer's misidentification arrest of a white woman pursuant to an arrest warrant for a black woman did not violate the Constitution. In *Patton v. Przybylski, 822 F.2d 697, 698-99 (7th Cir. 1987),* the court concluded that a police officer's misidentification arrest of the plaintiff -- a black man with the same name as a black man listed in an arrest warrant -- was, as a matter of law, a reasonable mistake that did not violate the Constitution, although plaintiff's driver's license[**11] was from a different state, listed an address different from the one in the arrest warrant, and listed plaintiff's date of birth as different from the one in the arrest warrant. In *Brown v. Patterson, 823 F.2d 167, 169 (7th Cir. 1987),* the court concluded that a police officer's misidentification arrest of the plaintiff -- a black man with the same name as the alias n10 of a black man listed in an arrest warrant -- was, as a matter of law, a reasonable mistake that did not violate the Constitution, although the plaintiff's driver's license listed an address different (in a different city) from the one in the arrest warrant and listed plaintiff's date of birth as different (by 12 days) from the one in the arrest warrant.

Footnotes- - - - - - - - - - - - - - - - - - -

n9 The Seventh Circuit's views on the

subject are consistent with other circuits. See *Brady v. Dill, 187 F.3d 104, 114 (1st Cir.1999)* (citing, among others, Seventh Circuit opinion concluding that mistakenly arresting person of different race not unreasonable and stating that "courts have concluded with some regularity that relatively minor discrepancies in physical features or other data do not render unreasonable an arrest pursuant to a facially valid warrant"). [**12]

n10 The alias was a very common name with 15 identical listings in the local phone book.

End Footnotes-- - - - - - - - - - - - - - - -

According to a district court in the Seventh Circuit, these three cases stand for this proposition: "In the Seventh Circuit's view, a police officer acts reasonably if he arrests a person after determining that the person's name matches the name [*1347] listed on an outstanding arrest warrant." *Bruce v. Perkins, 701 F. Supp. 163, 164 (N.D. Ill. 1988).* We, however, need not adopt this broad rule to decide today's case. To the contrary, as the Seventh Circuit itself has recognized, we must evaluate the totality of the circumstances surrounding the arrest to determine its reasonableness. See *Patton, 822 F.2d at 699-700* (examining totality of the circumstances); see also *United States v. Glover, 233 U.S. App. D.C. 161, 725 F.2d 120, 122 (D.C. Cir. 1984)* ("The reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances

surrounding the arrest."); cf. *United States v. Gonzalez, 969 F.2d 999, 1006 (11th Cir. 1992)[**13] (concluding that: "A policeman's mistaken belief of fact can properly contribute to a probable cause determination and can count just as much as a correct belief as long as the mistaken belief was reasonable in the light of all the circumstances.").*

Rodriguez' identifying information was identical to the information listed in Heredia's warrant in four critical aspects: same name, same sex, same age, n11 and same race. Significant other information was similar: (1) they had similar Social Security numbers; n12 (2) they had addresses in neighboring towns; n13 and, (3) they were born in the same state. Rodriguez (4) also had no fewer tattoos than Heredia, and many of the tattoos were in the same locations. Against all of these similarities is one material n14 difference: Rodriguez says he is 5'11" tall, and the warrant listed Heredia as 5'6". n15 A reasonable [*1348] mistake cannot, however, be transformed into an unreasonable mistake over such a small difference, given all the circumstances.

Footnotes- - - - - - - - - - - - - - - - - - - -

n11 According to the warrant, Heredia used multiple birth dates. Heredia's various birthdays all occurred in 1953, the same year Rodriguez was born.

n12 According to the warrant, Heredia used multiple Social Security numbers. Heredia's

various Social Security numbers were all similar to each other and similar to Rodriguez' .

n13 See *Brown, 823 F.2d at 169* (relying on following when determining that arrest was reasonable: "If like many criminals [the person listed in the warrant] has an alias--and there is no suggestion that he does not, in fact, use the alias of "Anthony Brown"--it would not be surprising if he also has a false address and birthdate. ... Harvey, where [the plaintiff] was arrested, surrounds Phoenix, where he lives, and is near Chicago, where [the person listed in the warrant] lives (or lived when the warrant was issued--he presumably decamped shortly afterward, or he would have been arrested).").

n14 We do not consider the other differences of much importance. Eye color (given contact lens), scars (given cosmetic surgery), and weight are all easily variable, especially over six years. This variability lessens the importance of differences in these characteristics. See *Brady, 187 F.3d at 112* (discussing false arrest cases in context of false imprisonment case and stating that "we live in an age where altering physical features may be accomplished with facility"); *Blackwell v. Barton, 34 F.3d 298, 304 (5th Cir. 1994)* (stating, in context of mistaken arrest case, "discrepancies in hair and eye color or skin tone are not determinative in this day when use of hair dyes, cosmetic contact lenses, and tanning salons is relatively common"). Not every change in a fugitive's appearance can properly prevent arrest by police officers.

n15 Arresting police officers need not act as judges determining ultimate facts. Trials of guilt or innocence cannot be undertaken by police officers on the side of the road in the middle of the night before an officer can effect a lawful arrest pursuant to a valid warrant. In this case, the arresting officer said, on the spot, he did not believe plaintiff was as tall as plaintiff claimed to be. The officer was not obligated to accept plaintiff's statements as true. See *Marx v. Gumbinner, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990).* Moreover, even if the arresting officer was fully aware that plaintiff was some inches taller than the 5'6" set out in the warrant, not every discrepancy (as we have already said) in height and so forth would demand that the policeman refrain from executing the warrant. See *Thompson v. Prince William County, 753 F.2d 363, 365 (4th Cir. 1985).* Other strong indicators in the warrant matched plaintiff. There are limits on how much independent investigating an officer must make before executing an arrest warrant, even when the arrested person is asserting a claim of mistaken identity. See *Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979).* The question is not whether the police could have done more; but whether they did just enough. Furthermore, the circumstances that justify a lawful arrest also justify a brief detention incident to the arrest. See *Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 863, 43 L. Ed. 2d 54 (1975).* Plaintiff was released within minutes of having been fingerprinted at the jail when it was realized that plaintiff was not the

person who was the true subject of the arrest warrant.

End Footnotes- - - - - - - - - - - - - - - -

In other words, in the context of this case, a mistaken estimate of no more than five inches does not equal a constitutional violation. After all, Sgt. Farrell and Officer Szczepanski were in the field, not in a police station. Cf. *Cannon v. Macon County, 1 F.3d 1558 (11th Cir. 1993)* (reinstating jury verdict against official who worked at police station after concluding that official's failure, when under no time pressure over seven-day period at police station, to investigate discrepancies between descriptive information contained in arrest warrant and description of person arrested pursuant to that warrant amounted to constitutional violation), modified, *15 F.3d 1022 11th Cir. 1994)*. They -- after midnight, on a dark street, immediately after finding unlawful drugs in a container in the vehicle in which Rodriguez was one of only two occupants -- were trying to determine whether Rodriguez was the person described in the warrant, a warrant charging the listed person with drug possession. See *Patton, 822 F.2d at 699-700* (relying on fact that arrestee "was in an automobile rather than at home; if [the officer] had let him go it[**17] might have taken a long time to catch up with him again (if he was the 'real' [person listed in the warrant])" and "the edginess all policemen feel in confronting a criminal suspect at night on a highway" when concluding that no finder of fact

could conclude that officer acted unreasonably in arresting wrong person for arrest warrant despite discrepancies).

Time was short in the situation facing Sgt. Farrell and Officer Szczepanski: a nighttime traffic stop. The officers had minutes to make their determination, not months or even days: Rodriguez soon had to be either arrested or let go. Cf. *Tillman v. Coley, 886 F.2d 317, 321 (11th Cir. 1989)* (concluding that sheriff's failure to investigate discrepancies in identity of person against whom he sought arrest warrant -- discrepancies of which he was aware three months before seeking the warrant -- could constitute constitutional violation sufficient to form foundation of section 1983 constitutional false arrest claim); *Cannon, 1 F.3d at 1558* (seven day detention period). Given all the circumstances, the Constitution's guarantee against "unreasonable" seizures was not violated by an estimate[**18] of height that was accurate within 5 inches. n16

Footnotes- - - - - - - - - - - - - - - - - - -

n16 We can find only one circuit court opinion -- Rodriguez cites none -- actually holding an officer potentially liable for the mistaken arrest of someone pursuant to a valid arrest warrant for another. See *Watts v. County of Sacramento, 256 F.3d 886 (9th Cir. 2001).* But, Watts is very different from our case. Most important, Watts involved the entry into and an arrest in a home and, even more worrisome, a

home that was not known to be the dwelling place of the person listed in the warrant.

Under the circumstances of this case, defining "reasonable mistake" to exclude the acts of Sgt. Farrell and Officer Szczepanski -- thereby creating a cause of action against them and subjecting them personally to possible monetary liability -- would likely deter future officers too much from making arrests in public places on valid warrants about which they do not have first-hand knowledge: the risk of error in identification, and then a lawsuit, would simply be too great. As a result, persons sought for crimes would, therefore, find it easier to evade capture. See *Johnson, 680 F.2d at 41* ("If an officer executing an arrest warrant must do so at peril of damage liability under section 1983 if there is any discrepancy between the description in the warrant and the appearance of the person to be arrested, many a criminal will slip away while the officer anxiously compares the description in the warrant with the appearance of the person named in it and radios back any discrepancies to his headquarters for instructions.").

End Footnotes- - - - - - - - - - - - - - - -

[*1349]

Put differently, we -- given the facts as Rodriguez presents them -- conclude, as a matter of law, that Sgt. Farrell and Officer Szczepanski made a "reasonable mistake" when they arrested Rodriguez pursuant to Heredia's warrant and, thus, committed no constitutional

violation upon which to base a section 1983 constitutional false-arrest claim. n17

Footnotes- - - - - - - - - - - - - - - - - - -

n17 Sgt. Farrell and Officer Szczepanski have not argued in this appeal that the pertinent arrest was consistent with the Federal Constitution because probable cause (even if no warrant had been involved) existed for the arrest, given that plaintiff was one of only two occupants of an automobile in which the police had just found unlawful drugs in a container that was also in the automobile. So, we do not address that issue. But for background, see *United States v. Buckner, 179 F.3d 834 (9th Cir. 1999); Fernandez v. Perez, 937 F.2d 368 (7th Cir. 1991).*

We, however, do treat the fact that plaintiff was riding in an automobile in which unlawful drugs had been found in a container to which plaintiff had access and had handled as a significant part of the totality of the circumstances of plaintiff's arrest. Plaintiff was not just walking down the street and stopped because passing police officers thought he might fit some outstanding warrant. He was in a car that was carrying drugs, and he (to say the least) was of the same name, sex, race, and age as a person for whom a warrant for a drug crime was outstanding. It is the arrest in these circumstances that is before us. The warrant did not have to justify this arrest in a vacuum; something, at least, approaching (if not reaching)

probable cause to arrest was established by plaintiff's having been in the car where drugs were being carried. So, the warrant - - with its substantial similarities between plaintiff and the person for whom the warrant was issued -- need not (and should not) be viewed alone: abstract and pure.

End Footnotes- - - - - - - - - - - - - - - -

2. Clearly Established Law

In the alternative, we conclude that, given the law at the time of arrest, the unlawfulness of the arrest was not already clearly established. "A government-officer defendant is entitled to qualified immunity unless, at the time of the incident, the 'preexisting law dictates, that is, truly compels,' the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs' federal rights in the circumstances." *Marsh v. Butler County, 268 F.3d 1014, 1030-31 (11th Cir. 2001)* (en banc) (quoting *Lassiter, 28 F.3d at 1150).* Furthermore, because Fourth Amendment qualified-immunity determinations turn on the reasonableness of an officer's acts in a certain set of facts, the Supreme Court recently stressed that the determination of whether a legal right was already clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz, 150 L. Ed. 2d 272, 533 U.S. 194, 121 S. Ct. 2151, 2156 (2001).*

Assuming, arguendo, that Sgt. Farrell and Officer Szczepanski's mistaken arrest of Rodriguez was[**21] unreasonable in the constitutional sense and that Rodriguez, thus, has stated a claim for unconstitutional arrest, the constitutional violation -- at the time of the arrest -- was not already clearly established: Rodriguez cited to no case (nor can we find one) in this Circuit or from the United States Supreme Court [*1350] or Florida Supreme Court that has ever held an officer, under any set of circumstances, liable for misidentifying an arrestee when executing a valid arrest warrant.

The cases that are factually closest to the instant case (and that conclude that an officer is, or may be, liable under section 1983) are *Cannon v. Macon County, 1 F.3d 1558 (11th Cir. 1993),* and *Tillman v. Coley, 886 F.2d 317 (11th Cir. 1989).* Both of these cases are, however, materially different from this case.

Cannon and Tillman share a fundamental distinction from our case: neither case involves an on-the-spot decision to arrest by an officer in the field. Cannon concluded that an official at a police station was liable for failing to identify correctly the plaintiff during seven days of incarceration under the official's care. *Cannon, 1 F.3d at 1562-63.[**22] Cannon did not conclude that the officer, who executed the warrant (the validity of which was not challenged) in the field, was liable. 1 F.3d at 1561.* Tillman deals with the application for an arrest warrant that the court concluded was insufficient because the affidavit

submitted to the magistrate lacked probable cause; Tillman decides nothing about the execution of a valid arrest warrant in the field. *Tillman, 886 F.2d at 320-21.* Thus, Cannon and Tillman are not like this case: they do not address situations involving an officer's execution of a valid arrest warrant in the field. Given the circumstances of the case at hand, the precedents cannot have clearly established the applicable law for the purposes of the qualified immunity defense. See generally *Marsh, 268 F.3d at 1031-34* (explaining use of precedents to determine clearly established law).

Public officers need not err on the side of caution. *268 F.3d at 1030 n.8.* And, "public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992)[**23] (Edmondson, J., dissenting), approved en banc, 998 F.2d 923 (11th Cir. 1993).* At the time of the pertinent arrest, no precedent had decided that an officer committed a constitutional violation by mistakenly executing a valid arrest warrant against the wrong person. Closer to the point, no precedent had decided that the nighttime arrest, in conjunction with a traffic stop, of a person -- who had been riding in an automobile in which unlawful drugs were being carried, and who was admittedly within five inches of the height of a fugitive for which a valid warrant for arrest (for offenses including a drug offense) was in existence and known to the arresting officers -- violated the Federal

Constitution when the arrested person shared with the fugitive (1) similar birth dates, social security numbers, addresses, birth places and tattoos as well as (2) the identical name, sex, race and age. n18 Therefore, we conclude that, if Sgt. Farrell's and Officer Szczepanski's mistake in arresting Rodriguez was not, as a matter of law, a "reasonable" one, it was, at least, an arguably reasonable one in the light of the unsettled, preexisting law. See *Marsh, 268 F.3d at 1030 n.8, 1031 n.9.[**24] We must, therefore, reverse the district court's denial [*1351] of qualified immunity to Sgt. Farrell and Officer Szczepanski.*

Footnotes- - - - - - - - - - - - - - - - - - -

n18 We very occasionally encounter the exceptional case in which a defendant officer's acts are so egregious that preexisting, fact-specific precedent was not necessary to give clear warning to every reasonable (by which we, in the qualified immunity context, always mean every objectively reasonable) officer that what the defendant officer was doing must be "unreasonable" within the meaning of the Fourth Amendment. See *Priester v. City of Riviera Beach, 208 F.3d 919 (**11th Cir.** 2000).* See generally *Marsh, 268 F.3d at 1031 n.9* (discussing means by which officers can be fairly and clearly warned). But the case now before us is not one like that.

End Footnotes- - - - - - - - - - - - - - - - -

B. Excessive Force During the Arrest

We conclude that the force used by Sgt. Farrell during his arrest of Rodriguez did not violate the Constitution. The use of excessive force in carrying out an arrest constitutes[**25] a violation of the Fourth Amendment. *Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).* But, "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396. In the Eleventh Circuit, we recognize that the typical arrest involves some force and injury. See *Nolin v. Isbell, 207 F.3d 1253, 1257-58 (11th Cir. 2000).*

The evidence, in the light most favorable to plaintiff, shows that Sgt. Farrell grabbed plaintiff's arm, twisted it around plaintiff's back, jerking it up high to the shoulder and then handcuffed plaintiff as plaintiff fell to his knees screaming that Farrell was hurting him. Plaintiff was placed in the rear of Sgt. Farrell's patrol car, kept handcuffed behind his back and transported to the police station. The were removed minutes after arrival at the police department. The handcuffing technique used by Sgt. Farrell is a relatively common and ordinarily accepted non-excessive way to detain an arrestee.

Plaintiff's orthopedic surgeon testified that the handcuffing was a "very [**26]serious, painful event," that resulted in the loosening of the internal surgical hardware, and caused the displacement of a key bone fragment. The

resulting complications included more than twenty-five subsequent surgeries and ultimately amputation of the arm below the elbow. n19

Footnotes- - - - - - - - - - - - - - - - - - -

n19 Given the loss of an arm, we are presented with the proverbial "hard case," that is, one in which one's natural sympathies are aroused by the plaintiff's plight. We recall Justice Jackson's warning to judges: "We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law." *FCC v. WOKO, Inc., 329 U.S. 223, 229, 67 S. Ct. 213, 216, 91 L. Ed. 204 (1946).*

End Footnotes- - - - - - - - - - - - - - - - - -

Painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal. See *Nolin, 207 F.3d at 1257-58* (concluding, as a matter of law, that force used during arrest, including handcuffing, was not excessive when force and resulting injury were minimal); *Brissett v. Paul, 141 F.3d 1157 (4th Cir. 1998)[**27] (table) (concluding, as matter of law, that painful handcuffing with minimal injury not constitutional violation); Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076, 1082 (8th Cir. 1990)*(same); see also *Martin v. Gentile, 849 F.2d 863, 869-70 (4th Cir. 1988)* (concluding that force used, as a matter of law, was not excessive); *Silverman v. Ballantine, 694 F.2d 1091, 1096-97 (7th Cir. 1982)* (same).

This case is different from Nolin because Rodriguez' earlier surgery made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results. This distinction, however, is not important legally and does not preclude a conclusion that Rodriguez has shown no constitutional violation: no evidence has been presented that Sgt. Farrell knew of plaintiff's recent elbow surgery or, more important, knew that handcuffing plaintiff would seriously aggravate plaintiff's preexisting condition. n20 We do [*1353] not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time[**28] of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time. See *Silverman, 694 F.2d at 1096-97* (concluding that force used was not, as a matter of law, excessive even though arrestee died of heart attack during arrest). Under the circumstances of this case, Sgt. Farrell's acts cannot rise to the level of a constitutional violation. n21

Footnotes- - - - - - - - - - - - - - - - - - -

n20 Rodriguez admits that he did not tell Sgt. Farrell that he had an injured arm before his arrest, and nothing outwardly indicated that Rodriguez' arm was injured after

Rodriguez was outside the car. But, Rodriguez asks us to infer from the evidence he presented that Sgt. Farrell knew or should have known that Rodriguez' arm was already injured and required special treatment during the arrest. Rodriguez specifically argues that the evidence shows that, before Sgt. Farrell arrested him: (1) Rodriguez told Sgt. Farrell that he had just gotten out of the hospital because he (Rodriguez) had been in a motorcycle accident; (2) Sgt. Farrell briefly looked through Rodriguez' hospital records; and, (3) Sgt. Farrell was standing behind Ms. Foulkes' car when Rodriguez was in the car and still had his arm in a sling. From these three circumstances, Rodriguez says that one can reasonably infer that Sgt. Farrell knew about Rodriguez' injured arm and that the arm demanded special treatment. We disagree.

Sgt. Farrell testified flatly that he did not see Rodriguez' arm in a sling. And, the circumstances to which Rodriguez points are not inconsistent with Sgt. Farrell's sworn testimony. Rodriguez admits that the interior of Ms. Foulkes' car -- the area into which Sgt. Farrell, from his position behind the car, would have needed to have seen Rodriguez in his sling -- was "dark." Never does Rodriguez tell us how far behind the pertinent car Sgt. Farrell was standing. Never does Rodriguez say that he saw Farrell focus on him while Rodriguez was in the car wearing a sling.

Given the evidence in this record,

Rodriguez relies on conjecture that the sling could have, and would have, been observed by a reasonable officer. See *Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982)* ("An inference is not reasonable if it is 'only a guess or a possibility,' for such an inference is not based on the evidence but is pure conjecture and speculation."). **Rodriguez** cannot overcome contradictory direct evidence -- Sgt. Farrell's sworn testimony that he did not see the sling -- and raise a genuine issue of fact. We decline to accept Rodriguez' contended-for double inference (that the sling was observable and that Sgt. Farrell made, or a reasonable officer would have made, that observation in the context of what was occurring generally in the nighttime traffic stop and arrest of Ms. Foulkes) to prove that Sgt. Farrell saw, or should have seen, Rodriguez' arm in the sling. See generally *Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1355 (11th Cir. 1999)* (concluding that inference that one person told a second person about a specific fact regarding a topic, based upon evidence that the first and second persons met and talked and evidence that the second person knew about the topic generally, was unreasonable speculation in the light of an affirmative denial of knowledge of the specific fact by the second person); *Burrell v. Board of Trs. of Georgia Military Coll., 970 F.2d 785, 791 n.15 (11th Cir. 1992)* ("Considering that Burrell cannot offer evidence of the contents of Baugh's and Baggarly's meeting, that Baugh and Baggarly provide a reasonable and consistent explanation for their meeting, that Baugh and

Baggarly flatly deny having discussed Burrell, only one fact can be inferred from their meeting: that the meeting took place. Any conclusion about the content of their discussion in contradiction to their testimony would qualify as speculation, not inference."); *Daniels, 692 F.2d at 1326* (concluding jury could not reasonably draw inference that nursing home's negligent act of allowing patient to wander away from home was proximate cause of patient's death because inference was only supported by mere scintilla of evidence and conflicted with uncontradicted facts). See also *Pennsylvania R.R. v. Chamberlin, 288 U.S. 333, 340-41, 53 S. Ct. 391, 77 L. Ed. 819 (1933)* ("And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."). Thus, the evidence is insufficient to support a finding that Sgt. Farrell knew, or should have known, about Rodriguez' injured arm (and that the arm demanded special treatment) because Rodriguez had the arm in a sling at a time before his arrest.

Nor does Rodriguez' testimony that Sgt. Farrell briefly "looked" at Rodriguez' hospital records raise an inference that Sgt. Farrell knew, or should have known, about Rodriguez'

injured arm and that the arm demanded special treatment. Rodriguez specifically testified that Sgt. Farrell "looked" at the records; he admits that Farrell did not "read" them. Rodriguez also provides no evidence tending to show specifically what the content of these hospital records would have been. Under the circumstances, this evidence, even combined with evidence that Rodriguez told Sgt. Farrell that he had just gotten out of the hospital after a motorcycle accident, is not enough to support an inference that Sgt. Farrell knew, or should have known, specifically that Rodriguez' arm was injured and that the arm demanded special care. Cf. *Clover, 176 F.3d at 1355.*
*[**29]*

n21 In the alternative, we conclude that Sgt. Farrell is entitled to qualified immunity on the excessive force claim.

End Footnotes- - - - - - - - - - - - - - - - - -

REVERSED and REMANDED for further proceedings consistent with this opinion.

JOE JOHN RODRIGUEZ, Plaintiff-Appellee, versus WAYNE W.FARRELL, LOIS SZCZEPANSKI, Defendants-Appellants.
No. 00-13147

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

294 F.3d 1276; 2002 U.S. App. LEXIS 11860; 15 Fla. L. WeeklyFed. C 677

June 17, 2002, Decided
June 17, 2002, Filed

JUDGES: Before EDMONDSON, Chief Judge, RONEY, Circuit Judge, and JORDAN * , District Judge.

* Honorable Adalberto J. Jordan, U.S. District Judge for the Southern District of Florida, sitting by designation.

OPINIONBY: EDMONDSON

OPINION: [*1277] PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

EDMONDSON, Chief Judge:

On interlocutory appeal from the district court's denial of qualified immunity to two police officers at the summary judgment stage, we reversed. Plaintiff, Joe John Rodriguez, has since filed a petition for rehearing and a

suggestion for rehearing en banc. Although these filings do not cause us to change our conclusion, they do point to two portions of the record that deserve comment.

On the question of unreasonable seizure, Rodriguez points us to our discussion of his "brief detention" at the end of footnote 15 of our original opinion. He stresses that his transportation to the jail from which he was released (and his transportation back from that jail after he was released) took several -- roughly 18 total -- hours. The evidence shows that, [**2] shortly after his arrest at around one o'clock in the morning, Sgt. Farrell took Plaintiff to the local police station. Plaintiff stayed at the station for roughly two hours before he was transported by other officers, via one county jail were he stayed for some hours, to the jail of the county from which the outstanding warrant came. This final jail was "hours" away from the places of confinement to which Plaintiff was initially taken. After his release, Plaintiff was transported from the final jail and, at his request, was dropped off near his home between 7:00 and 8:00 pm that same day. No delay for delay's sake has been alleged or is supported by the evidence.

Assuming that the entire time of confinement was caused by Sgt. Farrell and Officer Szczepanski, n1 Plaintiff's journey to the jail in the county that issued the arrest warrant (even including his return from that jail), despite its extended nature, was still a "brief detention:" a

reasonable detention incident to Plaintiff's lawful arrest. See generally *County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 1670, 114 L. Ed. 2d 49 (1991)* (stating that delays of less than 48 hours for judicial determinations[**3] of probable cause are presumptively reasonable, unless detainee can prove that determination was delayed unreasonably, and noting that "courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another" when determining reasonableness).

Footnotes- - - - - - - - - - - - - - - - - - -

n1 This assumption is likely wrong. For background, see *Lindsey v. Storey, 936 F.2d 554, 563 (11th Cir. 1991)* (affirming grant of summary judgment to defendant officer on plaintiff's wrongful continued detention claim where officer had arguable probable cause to arrest plaintiff and plaintiff had presented no evidence that defendant officer was responsible for inmates being promptly arraigned).

End Footnotes- - - - - - - - - - - - - - - - - -

On the issue of excessive force, Rodriguez has highlighted evidence tending to show that after Sgt. Farrell grabbed Plaintiff's arm and commenced the handcuffing, Plaintiff told Sgt. Farrell, during the handcuffing, to be careful because Plaintiff's arm was injured. n2 And, Rodriguez [*1278] stresses that, even if the initial handcuffing[**4] was not excessive, his continued handcuffing was excessive.

Footnotes- - - - - - - - - - - - - - - - - - - -

n2 In his deposition, Plaintiff testified that he screamed in pain and screamed that his arm was hurting when Sgt. Farrell applied the pain compliance handcuffing technique described in our original opinion. Also in that deposition, Plaintiff unequivocally states that, even after the handcuffing began: "I didn't even tell him then [that my arm was specifically injured], I was just telling him that he was hurting my arm." In contrast, Sgt. Farrell testified in his deposition that he simply handcuffed Plaintiff behind his back: he denies applying any pain compliance handcuffing technique when arresting Plaintiff or that Plaintiff screamed, in pain or otherwise. But, Sgt. Farrell does note that Plaintiff did ask him to be careful after Farrell started the handcuffing because his (Plaintiff's) arm was injured. We take the best set of facts for Plaintiff.

End Footnotes- - - - - - - - - - - - - - - - - - -

As we noted in our original opinion, a police officer need not credit everything a suspect tells him. [**5] See *Marx v. Gumbinner, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990).* This idea is especially true when the officer is in the process of handcuffing a suspect. As another federal court recently noted, statements by suspects claiming (at the time of their arrest) to have pre-existing injuries are, "no doubt, uttered by many suspects who, if given

the choice, would prefer not to be handcuffed at all and, if they must be restrained in that manner, would prefer that the handcuffs be in front." *Caron v. Hester , 2001 U.S. Dist. LEXIS 19382, 2001 WL 1568761,* at *8 (2001) (granting officer, who handcuffed suspect behind suspect's back, qualified immunity on excessive force claim despite officer's alleged knowledge -- based upon suspect's testimony that he told the officer -- of suspect's pre-existing injury when "[the officer] was not confronted with any objective manifestation of [the suspect's] claimed shoulder problem"). In the context of this case -- a case in which Sgt. Farrell, after midnight on the side of the road, reasonably believed that Plaintiff (who, as we discussed in our original opinion, had no obvious signs of injury specifically to his[**6] arm) was a fugitive who had evaded capture, Sgt. Farrell's alleged discounting of Plaintiff's arm-injury claim (a claim not made until after Sgt. Farrell began to arrest Plaintiff despite the fact that he had been in Sgt. Farrell's company for roughly 30 minutes when the handcuffing began) was reasonable. n3 Cf. *Jackson v. City of Bremerton, 268 F.3d 646, 652 (9th Cir. 2001)* (in arrest for failing to disperse, pushing suspect to the ground and kneeling on her back not excessive force despite fact that suspect informed officer of her pre-existing back and shoulder injuries); *Morreale v. City of Cripple Creek 1997 U.S. App. LEXIS 12229, 1997 WL 290976,* at *1, 5-6 (1997) (in arrest for driving with a suspended license, milder handcuffing of suspect behind her back not excessive force despite suspect's request that she be handcuffed

in front to avoid aggravating pre-existing shoulder injury).

Footnotes- - - - - - - - - - - - - - - - - - -

n3 Sgt. Farrell did see that Plaintiff had medical records and prescription drugs with him. And, before the arrest began, Plaintiff claims that he told Sgt. Farrell that Plaintiff had recently been released from a hospital after a motorcycle accident.

Perhaps, if Plaintiff, before the physical part of the arrest began, had also told Sgt. Farrell that Plaintiff's arm was injured, we would be more inclined to conclude that the Constitution required Sgt. Farrell to credit that statement. But, that is not what occurred here.

End Footnotes- - - - - - - - - - - - - - - - - -

That Plaintiff's handcuffs were not removed until about fifteen minutes after his initial handcuffing does not transform what is otherwise a meritless handcuffing-based excessive-force claim into a valid continued handcuffing-based excessive-force claim. See *Morreale, 1997 U.S. App. LEXIS 12229, 1997 WL 290976,* at *1 (plaintiff was handcuffed for twenty minutes while transported to station, during which time plaintiff complained of wrist pain from handcuffing: not excessive force). Plaintiff admits that [*1279] he -- even after the handcuffing -- never asked Sgt. Farrell to handcuff him in front of his body, instead of behind his back.

Nor did Plaintiff ask Sgt. Farrell to remove the handcuffs altogether. And, Plaintiff admits that he never asked Sgt. Farrell for medical assistance. n4 Furthermore, there is no evidence of delay for delay's sake during the time Plaintiff was kept handcuffed.

Footnotes- - - - - - - - - - - - - - - - - - -

n4 Plaintiff did testify that he moaned or grunted in pain while in transport to the police station and that, once at the station, told Sgt. Farrell that he was in pain. And, evidence tends to show that Plaintiff asked that his medications be brought with him from the scene of the arrest.

End Footnotes- - - - - - - - - - - - - - - - - -

Plaintiff's petition for rehearing is DENIED. And, no judge of the Court having requested a poll, Plaintiff's suggestion for rehearing en banc is DENIED.

Fourth Amendment to United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983, United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. 1441. United States Code:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. 1254, United States Code:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Winter Park Police Department Procedures:

106-12 Handcuffing

Purpose: to establish procedures for the proper use of handcuffs in restraining prisoners and protecting members of the department.

Procedure: Upon making an arrest, taking a person into custody, or transporting under the Baker or

Member:

1. Search prisoner for weapons, contraband, or evidence

2. Before transporting, all prisoners will be handcuffed behind their backs with the seat belt latched unless there are specific, articulable reasons for other actions. There may be some instances where it may be appropriate to handcuff a prisoner in front of his body or not to handcuff at all. However, these instances are rare and such action should be justified by each officer, ie: very young, old, or disabled persons.

3. Handcuff any person in your custody who exhibits violence or may injure themselves (Baker and Meyers Act)

4. May use leg manacles on individuals charged with serious crimes who are strong escape risk, or who are extremely violent.

Note:

it is our responsibility to see that prisoners in our custody receive necessary medical treatment; therefore, members shall not interfere with the necessary tasks to be performed by medical personnel. However, it is the responsibility of the Department to ensure a prisoner does not escape.

Sup. Ct. U.S.

02 651 AUG 13 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Joe John Rodriguez

Petitioner

vs.

Wayne W. Farrell, and Lois Szczepanski

On Petition for Writ of Certiorari
To the United States Court of Appeals for
the Eleventh Circuit

SUPPLEMENTAL APPENDIX OF PETITIONER

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25 pp

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

CASE NO. 6:98-997-CIV-ORL-19A

JOE JOHN RODRIGUEZ,
Plaintiff,

v.

CITY OF WINTER PARK, FLORIDA,
a municipal corporation, WAYNE W. FARRELL,
and LOIS SZCZEPANSKI,
Defendants.

ORDER

This cause came before the Court on the following matters: 1) Defendant City of Winter Park's Motion for Summary Judgment and Incorporating Memorandum of Law (Doc. No. 50, filed March 9, 2000) and Combined Response of the Plaintiff to the Motions for Summary Judgment by all Defendants (Doc. No. 76, filed April 10, 2000).

2) Motion for Summary Judgment of Defendants, Wayne M. Farrell and Lois (Lorri) Szczepanski and Supporting Memorandum of Law (Doc. No. 43, filed March 8, 2000) and Combined Response of the Plaintiff to the Motions for Summary judgment by all Defendants (Doc. No. 76, filed April 10, 2000).

3) Plaintiff's Motion for Partial Summary Judgment Against the Defendant, City of Winter Park (Doc. No. 60, filed March 10,2000) and Defendant City of Winter Park's Opposition to Plaintiff's Motion for Partial Summary Judgment (Doc. No. 64, filed March 29, 2000).

BEST AVAILABLE COPY

Introduction

Plaintiff Joe John Rodriguez brings this lawsuit based on 42 U.S.C. § 1983 against Defendants city of Winter Park, Florida, Sergeant Wayne W. Farrell, and Officer Lois Szczepanski (sergeant Farrell and Officer Szczepanski will be referred to as the "Individual Defendants" The Plaintiff asserts that all of the Defendants violated his constitutional rights by unlawfully arresting him in violation of 42 U.S.C. § 1983 ("unlawful arrest claim"). The Plaintiff asserts that the city of Winter Park is liable for the common law tort of false arrest "false arrest claim" The Plaintiff also asserts that the city of Winter Park and Sergeant Farrell are liable for using excessive force in violation of 42 U.S.C. § 1983. The Defendants have moved for summary judgment on all of the Plaintiff's claims The Plaintiff moves for partial summary judgment on his claims against Defendant City of Winter Park

Facts

When the record evidence is viewed in a light most favorable to the Plaintiff, the pertinent facts are as follows. The Plaintiff was traveling in a car driven by his friend Patricia Foulkes (Doc No. 45 at ¶ 4). The car was directed to stop by a police car driven by Officer Szczepanski See id. During the course of the stop, Ms. Foulkes agreed to allow Officer Szczepanski to search her purse. See id. The search revealed the existence of several illegal or controlled substances. Officer Szczepanski arrested Ms. Foulkes. See id. During the stop, Sergeant Farrell arrived as back up to Officer Szczepanski. See id.

During the stop, the officers also investigated the identity of the Plaintiff. (Doc. No. 45 at ¶ 5; Doc. No. 46 at ¶ 5; Doc No. 68 at ¶ 15) In response to questions by Sergeant Farrell, the Plaintiff told Sergeant Farrell that his name was Joe Rodriguez and that his identification was inside the clutch of his duffel bag. (Doc. No. 68 at ¶ 15). Sergeant Farrell asked for permission to search the duffel bag. See id. The Plaintiff gave him such permission. See id. Sergeant Farrell then removed the Plaintiff's driver's license and used his radio to communicate the Plaintiff's name and driver's license number See id. Sergeant Farrell then continued to look through the bag. See id. The bag contained a manilla folder containing hospital records, two or three bottles of prescription medication, and the zippered clutch. See id. Sergeant Farrell asked about the medication See id. The Plaintiff told Sergeant Farrell that the medication was his and that he had just gotten out of the hospital due to a motorcycle accident. See id.

A female voice then came over the radio stating "no wants or warrants." (Doc. No. 68 at ¶ 16). Sergeant Farrell then walked away from the Plaintiff. (Doc. No. 68 at ¶ 19). At that time, a "hit" was obtained from the St. Johns county Sheriff's Department (Doc. No. 46 at ¶ 5 specifically, it was learned through teletype communications that a warrant existed for a Victor Heredia who used an alias of Joe Rodriguez (Doc..No. 46 at ¶ 5). The individual was wanted on several charges, including drug related offenses (Doc. No. 56, Exhibit 2)

While it is not clear from the record or from the parties briefs what exact information was known by the officers at the time of the stop, the parties agree that the following information existed at such time about Victor Heredia and the Plaintiff:

	Victor Heredia	Plaintiff
Name:	Victor Manuel Heredia a/k/a Joe Rodriguez	Joe John Rodriguez
Sex:	Male	Male
Race:	White (Hispanic)	White
Birth date:	6/24/53; 7/2/53; 6/23/53 (multiple)	3/23/53
Birth Place:	New York	New York
Residence:	Apopka	St. Augustine
Social Security Numbers:	112-42-9808; 112-42-5808; 112-43-9808 (multiple)	115-42-5388
Height:	5'6"	5'11"
Weight:	139	180-190
Hair:	Brown	Brown
Eyes:	Green	Brown
Tatoos:	4 (various areas)	6 (various areas)
Other:	Scar on face	No scar on face

(Doc. No. 45 at ¶ 6; Doc No. 46 at ¶ 5; Doc No 56 Exhibits 2-3,11, 14-15; Doc No 68 at ¶ 4-7, 15, 18-20, 22; see also Doc. No. 43; Doc. No 50 Doc. No 76)[1]

After the name hit occurred, Sergeant Farrell returned to the Plaintiff to ask him some questions. (Doc. No. 46 at ¶ 6;Doc. No. 68 at ¶19-20). Sergeant Farrell asked the Plaintiff how tall he was (Doc No 68 at ¶ 19).

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[1] The teletype information about Victor Heredia was from more than five years before the arrest of the Plaintiff. (Doc. No. 45; Doc. No. 56, Exhibit 2).

The Plaintiff told him 5'll". See id. Sergeant Farrell said that he was 5'll" and that the Plaintiff was shorter. See Id. The Plaintiff responded that Sergeant Farrell was standing on a curb, while the Plaintiff was standing on the street. See id. Sergeant Farrell averred that he is six feet tall and that the Plaintiff appeared to be several inches shorter than him (Doc. No. 46 at ¶ 7) Officer Szczepanski remembered that the Plaintiff was between 5'7" and 5'9" (Doc. No. 49 at 13)

Sergeant Farrell then asked the Plaintiff if he had any tattoos. (Doc. No. 68 at ¶ 19). The Plaintiff said that he did. See id. Sergeant Farrell asked how many. See id. The Plaintiff said "six." Id. Sergeant Farrell asked, "But, do you have four?" Id. The Plaintiff responded, "[un order to have six you must have four Id. Sergeant Farrell then asked the
Plaintiff the locations of the tattoos. See id. The Plaintiff pointed to his left biceps with his right hand and then pointed to his right biceps with his left hand. See id. at 20.

Sergeant Farrell then, without warning, grabbed the Plaintiff's left arm from behind him, and twisted it up behind his shoulder blade (Doc No 68 at 20) The Plaintiff immediately fell to his knees in pain and yelled "what are you doing?" He repeatedly said to Sergeant Farrell "stop," "wait a minute," and that he was hurting him. Id. The Plaintiff asked Sergeant Farrell to be careful handcuffing him. (Doc. No.. 46 at ¶ 9) The Plaintiff was handcuffed. (Doc. No. 68 at ¶ 21). He continued to yell to Sergeant Farrell that he was hurting him. See id. at ¶ 22. He was grimacing in pain. See id.

Sergeant Farrell then said, "We've got you, Victor Herrara [sic]" and told him they had three warrants on him from St. John's County (Doc. No. 68 at ¶ 22). The

Plaintiff asked where St John's County was. See id. Sergeant Farrell said that it was in St. Augustine. See Id. The Plaintiff said that he had only been to St. Augustine once and that was recently. See Id. He also asked who "Victor Herrara" was. Id. The Plaintiff told Sergeant Farrell that he was making a big mistake. See id. The Plaintiff repeatedly told Sergeant Farrell that he was mistaken. See Id. at 23.

The Plaintiff was then taken to the police station. (Doc. No. 68 at 23-26). In the car, the Plaintiff groaned in pain, and asked for his bag so he could take his medication. See id. at ¶ 23, 25). Sergeant Farrell did not ask why the Plaintiff was groaning or ask why he needed to take his medication. See Id. at ¶ 25. After they arrived at the police station, the Plaintiff told Sergeant Farrell that he needed to take his pain medication. See id. at 26. Sergeant Farrell said the other officer was bringing his bag. See id. The Plaintiff continued to moan and grimace in pain at the police station. See Id.

At the police station, the officers did not ask the Plaintiff the location of any of his other tattoos (Doc. No. 68 at ¶ 28) Also, the officers did not ask to look at the tattoos.[2] See id.

Officer Szczepanski filled out an arresting affidavit with the following information: 5'7" 140 lbs; brown eyes; social security number 112-42-9808; place of birth – Bronx, New York; date of birth June 24 1953. (Doc. No. 61).

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[2] The locations of the Plaintiff's tattoos are different from the locations of Victor Heredia's tattoos. (Doc.. No. 60, Exhibit A at 50).

The Plaintiff originally fractured his elbow in a motorcycle accident (Doc. No. 70 at 5-6). The Plaintiff's orthopaedic surgeon stated under oath that x-rays of the Plaintiff taken prior to his September 8, 1995 arrest and after his arrest show a widening of the Plaintiff's elbow fracture. The surgeon attributed such widening to trauma caused by the handcuffing. (Doc. No. 67 at ¶5; Doc. No. 70 at 11, 18). X-rays in November continued to show such problems (Doc.. No. 70 at 19). The Plaintiff had to have surgery due to complications in his left elbow joint in 1995, 1996, and 1997 (Doc.. No. 67 at ¶ 2)

Legal Analysis

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ.. P. 56(c); accord, Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id. at 248. The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex v. Catrett, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. Anderson, 477 U.S at 255. The Court may not weigh conflicting evidence or weigh the credibility of the parties. See, Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)(citation omitted). If a

reasonable fact finder could draw more than one inference from the facts and that inference creates an issue of material fact, then the Court must not grant summary judgment. Id. (citation omitted)

The Claim for Unlawful Arrest Against the Individual Defendants

The Individual Defendants first move for summary judgment on the Plaintiff's unlawful arrest claim. The Individual Defendants assert that they are entitled to qualified immunity on this claim.

Government officials sued in their individual capacities under section 1983 are able to assert qualified immunity as a defense to suit See, Wood v. Strickland, 420 U.S 308, 321-22 (1975); Harlow v. Fitzgerald, 457 U.S. 800, 814-20 (1982). Qualified immunity "protects government officials performing discretionary functions from civil liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. Dolihite v. Maughon By and Through Videon, 74 F.3d 1027, 1040 (11th Cir. 1996), cert. denied, 117 5. Ct 185 (1996) (quoting Harlow, 457 U.S. at 818); see also, Jones v. City of Dothan. Alabama, 121 F.3d 1456, 1459 (11th Cir 1997); Cofield v. Randolph County Comm'n, 90 F.3d 468, 470 (11th Cir 1996). A determination that the right is clearly established requires that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S 635 639-40; see also Cofield, 90 F.3d at 470; Rodgers v. Horsley, 39 F.3d 308, 310 (11th Cir 1994) "This is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it

is to say that in the light of pre-existing law the unlawfulness must be apparent." Dolihite, 74 F.3d at 1041 (quoting Anderson, 483 U.S at 640 (citations omitted).

In qualified immunity cases, the Eleventh Circuit applies an objective reasonableness test asking "'whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred Dolihite, 74 F.3d at 1041 quoting Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1503 (11th Cir 1990) This standard protects government officials from individual liability except the plainly incompetent or those who knowingly violate the law. See, Swint v. City of Wadley, Ala., 51 F.3d 988, 995 (11th Cir. 1995); Nicholson v. Georgia DeD't of Human Resources, 918 F.2d 145, 146 (11th Cir. 1991) (citing Mallev v. Briggs, 475 U.S. 341 (1986); Stewart, 908 F.2d at 1503).[3]

In a case involving an alleged unlawful arrest, a police officer is entitled to qualified immunity if probable cause or arguable probable cause exists for the arrest. See, Jones v. Cannon, 174 F.3d 1271, 1283 (11th Cir. 1999); see also, Wyatt v. Cole, 504 U.S. 158, 170 (1992) Arguable probable cause exists "if a reasonable police officer, knowing what [the defendants] knew,

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[3] "In qualified immunity cases, courts are given the often herculean task of weighing and comparing two competing standards that almost bump into each other and sometimes appear to overlap. Using the summary judgment standard, courts are

could have believed there was probable cause for the warrantless arrest." Jones, 174 F.3d at 1283.

In this case, an issue of fact exists as to whether or not Sergeant Farrell is protected by qualified immunity. A reasonable jury could find that Sergeant Farrell was aware of the five inch difference in height between the Plaintiff and Victor Heredia. (Doc. No. 45 at ¶ 5-6; Doc No. 46 at 5; Doc. No 56 Exhibits 2-3, 11, 14-15; Doc. No 68 at ¶ 4-7, 15, 18-20, 22). A reasonable jury could find that Sergeant Farrell aware that Victor Heredia had a scar on

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required to view the facts in a light most favorable to the plaintiff and to draw every inference in favor of the plaintiff. See, Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986). At the same time, using the qualified immunity standard, courts must consider whether a reasonable government official could have viewed his or her actions as lawful given the information possessed at the time of such actions. Dolihite v. Maughon By and Through Videon, 74 F.3d 1027, 1040-41 (11th Cir. 1996). Thus, when these standards are combined, a court is required to determine whether a reasonable government official could have viewed the action he or she supposedly took, when the purported facts surrounding such action are viewed in a light most favorable to the plaintiff, given the information the official possessed at the time of such action, when the purported facts surrounding such information is viewed in a light most favorable to the plaintiff. For instance, a court may be given limited facts such as that a police officer kicked an individual, who appeared large and menacing, during an arrest where the officer may

his face and that the Plaintiff did not have such a scar. See id. A reasonable jury could find that Sergeant Farrell was aware that the Plaintiff appeared much heavier than the description he had of Victor Heredia. See id. A reasonable jury could find that Sergeant Farrell was aware that the Plaintiff had different color eyes than Victor Heredia. See id. When these facts are viewed together, a reasonable officer in Sergeant Farrell's position may not have believed that he or she had probable cause or

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have, but probably did not, know facts which would have shed considerable doubt about whether the officer had probable cause to arrest the individual and where the individual said that the kick caused him extreme and lasting pain. The court must then determine whether every reasonable officer in the police officer's situation would inevitably conclude that the force that the police officer used was unlawful. See, Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (citation omitted). In order to make this determination, the court must weigh how hard the kick may have been, whether the force used was de minimis, whether the officer had arguable probable to arrest the individual, the threat to his or her safety the officer may have felt, and the injury which the individual may have experienced when the limited facts are viewed in a light most favorable to the individual and when every inference is drawn in favor of the individual. It is no wonder that confusion has developed in this area as to whether a government official is protected by qualified immunity at the summary judgment stage of a proceeding. See, e.g. Nolin, 207 F.3d at 1255-58 (discussing and

arguable probable cause to arrest the Plaintiff despite the similarities between the Plaintiff and Victor Heredia. See, Johnson v. City of New York, 940 F.Supp. 631, 636 (S.D.N.Y. 1996) (finding that issue of fact existed where five inch difference existed between height of individual arrested and the person who was wanted); see generally, Cannon v. Macon County, 1 F.3d 1558, 1564 (11th Cir. 1993) finding no qualified immunity where factual issue existed as to whether officer took any steps to determine whether person arrested was the wanted fugitive that officer thought her to be); Tillman v. Colev, 886 E.2d 317, (11th Cir. 1989) (affirming denial of qualified immunity on summary judgment where sheriff was only aware that name, height, weight, and complexion of individual arrested for identification purposes generally matched those of a suspect); but see , Brown v. Patterson, 823 F.2d 167, 173-74 (7th Cir. 1987) (finding qualified immunity existed

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distinguishing Eleventh Circuit cases involving the use of excessive force); see also, Tillman v. Coley, 886 F.2d 317, 320 (11th Cir. 1989) (affirming denial of qualified immunity on summary judgment where sheriff was only aware that name, height, weight, and complexion of individual arrested for identification purposes generally matched those of a suspect); Patton v. Przvbvlski, 822 F.2d 697, 699 (7th Cir. 1987) (police officer did not act unreasonably in arresting driver stopped for alleged traffic violation whose race, name, and year of birth matched that of person sought in outstanding warrant even though arrestee's driver's license bore different address and birth date from those of person sought).

where officer arrested individual based on having the same or similar name, race, sex, birth date and residence as person who was not wanted); Patton v. Przybylski, 822 F.2d 697, 699 (7th Cir. 1987) (police officer did not act unreasonably in arresting driver stopped for alleged traffic violation whose race, name, and year of birth matched that of person sought in outstanding warrant even though arrestee's driver's license bore different address and birth date form those of person sought).

An issue of fact also exists as to whether Officer Szczepanski is protected by qualified immunity for arresting the Plaintiff. According to Sergeant Farrell, Officer Szczepanski made the decision to arrest the Plaintiff after consulting with Sergeant Farrell. (Doc. No. 46 at ¶ 4). A reasonable jury could find that Officer Szczepanski was aware of the differences between Victor Heredia and the Plaintiff based on such consultation with Sergeant Farrell. Officer Szczepanski may also have breached her duty to take steps to identify whether the Plaintiff was Victor Heredia when she averred that he was five feet seven inches when she had access to his driver's license which stated that he was five feet eleven inches tall. (Doc. No. 61); see, Canon, 1 F.3d 1564 (finding that officer's failure to take any steps to identify an individual as the wanted fugitive for whom she was mistakenly arrested raised a question of fact as to the officer's deliberate indifference toward the individual's due process rights).

Accordingly, summary judgment is not warranted on the Plaintiff's Section 1983 unlawful arrest claim with respect to Sergeant Farrell and Officer Szczepanski.

The Unlawful Arrest and False Arrest Claims Against the City

The City of Winter Park ("City") moves for summary judgment on the false arrest claim and the unlawful arrest claim. The City first argues that summary judgment is warranted on these two claims because the officers had probable cause to arrest the Plaintiff. The City also argues that summary judgment is warranted on the unlawful arrest claim because the officers had arguable probable cause. Summary judgment is not warranted on these claims in favor of the City for these reasons because, as discussed above, an issue of fact exists as to whether the officers had probable cause or arguable probable cause to arrest the Plaintiff. See generally, Gold v. City of Miami, 151 F.3d 1346, 1349 (11th Cir. 1998); (discussing elements for unlawful arrest claim); Rivers v. Dillards Dept. Store, Inc., 698 So.2d 1328, 1331 (Fla. Dist. Ct. App. 1997) (discussing elements for false arrest claim).

The City next asserts that summary judgment is warranted on the unlawful arrest claim because the alleged unlawful arrests were not based on a municipal policy or custom. In order for the City to be liable on the unlawful arrest claim, the alleged unlawful arrest had to have been pursuant to a custom or policy of the City. See, Mandel v. Doe, 888 F.3d 783, 791 (11th Cir. 1989).

The Plaintiff has not directed the Court to evidence showing that the arrests were made based on an unconstitutional policy of the City. The Plaintiff argues that the City is liable because Chief of Police Douglass Ball ratified the conduct of the police officers through statements that he made. Chief of Police Ball, however, was not the chief of police at the time of the incident. (Doc. No. 45 at ¶ 2; Doc. No. 58 at ¶ 2). Accordingly, he could not have ratified the officers' actions. Ratification can only occur at or before the time of the unlawful action in order for such ratification to create municipal

liability. City of Louis v. Praprotniku, 485 U.S. 112, 130 (1988); Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir.1999) ("ratification requires, among other things, knowledge of the alleged constitutional violation"); Sango v. City of New York, 1989 WL 86995, *20 (E.D.N.Y. July 25, 1989); citing Tompkins v. Frost , 655 F.Supp. 468, 472 (E.D. Mich. 1987) ("conduct occurring after the incident at issue lacks she requisite 'affirmative link' to plaintiff's injuries -- that is, plaintiffs cannot establish causation").

The Plaintiff also argues that the City ratified the actions of the officers by finding no violation in a subsequent internal affairs investigation. A city's failure to discipline or take action against an employee is not evidence of a policy or custom which creates municipal liability in a Section 1983 case. See, Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998) ; Neill v. City of Concord, 1995 WL 234912, *7 (9th Cir. April 20, 1995) ; see also, Gold, 151 F.3d at 1353 (finding summary judgment warranted in favor of defendant city where there was no showing that the city's policy of investigating false arrest claims caused the arrest in the case before the court). Accordingly, summary judgment is granted in favor of the City on the unlawful arrest claim.

The Excessive Force Claim Against Sergeant Farrell:

Sergeant Farrell next asserts that he is protected by qualified immunity from the Plaintiff's excessive force claim. "It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment." Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998) (citing Graham v. Connor, 490 U.S. 386, 394 (1989)). In determining whether the force used is reasonable, courts must

examine the facts and circumstances of each case, "'including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Id. (quoting Graham, 490 U.S. at 396). A police officer will be protected by qualified immunity "'unless application of the standard would inevitably lead every reasonable officer in [the position of the defendant officer] to conclude the force was unlawful.'" Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (quoting Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993), modified 14 F.3d 583 (11th Cir. 1994)).

A police officer will also be protected by qualified immunity where a police officer in arresting an individual for whom there was probable cause or a warrant to arrest such individual used force that was de minimis. See Nolin, 207 F.3d at 1255-58. In Nolin, the Court found that a police officer was protected by qualified immunity where the appellee claimed the following facts existed:

> Appellee claims Appellant grabbed him from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his head into the side of a van, searched his groin area in an uncomfortable manner, and handcuffed him. Appellee maintains he suffered bruising to his forehead, chest, and wrists, although he admits the bruises disappeared quickly and he did not seek medical treatment.

Id. at 1254. The court distinguished the case from previous Eleventh Circuit cases in which force was used

against an individual where no probable cause or warrant existed for arresting the individual. See id. at 1258. Probable cause existed in the case before the Eleventh Circuit. See id. at 1255, 1258. The court found that qualified immunity existed to protect the police officer because the force used and injuries resulting from such force were minimal. See id. at 1258.

In this case, when the facts are viewed in a light most favorable to the Plaintiff, it appears that a reasonable jury could find that Sergeant Farrell used excessive force when arresting the Plaintiff and that such force was not de minimis. As noted above, an issue of fact exists as to whether Sergeant Farrell had probable cause or arguable probable cause to arrest the Plaintiff.[4] The Plaintiff had been allowed to walk around freely up until the time he was arrested. (Doc. No. 68 at ¶19). There is no evidence that the Plaintiff posed any threat to the police officers. (Cf. Doc. No. 45; Doc. No. 46; Doc. No. 68). The Plaintiff informed Sergeant Farrell that he had been in a motorcycle accident and asked him to be careful when he handcuffed him. (Doc. No. 46 at ¶ 9; Doc. No. 68 at ¶ 15). The Plaintiff avers that after he was handcuffed, and as a result of being handcuffed, he screamed in pain, repeatedly grimaced in pain, repeatedly informed Sergeant Farrell that he was in pain, and asked Sergeant Farrell for his pain medication. (Doc. No. 68 at ¶ 20-26). The Plaintiff's orthopaedic surgeon stated under oath that he believed that the Plaintiff's elbow injury was worsened by the handcuffing of the Plaintiff. (Doc. No. 67; Doc. No. 70 at 11, 18-26).

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[4] The possible lack of probable cause here distinguishes this case from Nolin. See Nolin, 207 F.3d at 1255, 1258.

The surgeon also indicated that the worsened injury required numerous surgeries over a period of almost two years. (Doc. No. 67; Doc. No. 70 at 18-49). This evidence is sufficient to create an issue of fact as to whether Sergeant Farrell used excessive force when he handcuffed the Plaintiff and purportedly left the handcuffs on in spite of the Plaintiff's protestations. See, Thornton v. City of Macon, 132 F.3d 1395, 1398-1400 (11th Cir. 1998); Howard v. Dickerson, 34 F. 3d 978, 979-81 (10th Cir.1994) ; Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993); Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); see also, Heitschmidt v. City of Houston, 161 F.3d 834, 839 (5th Cir. 1998); Guite v. Wright, 147 F.3d 747, 750 (8th Cir. 1998).

The Excessive Force Claim Against the City:

The City asserts that summary judgment is warranted in its favor on the excessive force claim. The Winter Park Police Department had the following policy regarding handcuffing at the time the Plaintiff was arrested:

> Before transporting, all prisoners will be handcuffed behind their backs with the seat belt latched unless there are specific, articulable reasons for other actions. There may be some instances where it may be appropriate to handcuff a prisoner in front of his body or not to handcuff at all. However, these instances are rare and such action should be justified by each officer. i.e. very young, old, or disabled persons.

(Doc. No. 56, Exhibit 16 at 106-12) .[5] The Plaintiff then

directs the Court to Chief of Police Douglas Ball's deposition. Once again, Chief of Police Ball's interpretation of the handcuffing policy cannot be interpreted as the City's custom or policy at the time of the arrest because Chief of Police Ball was not the chief of police at the time of the arrest.' Summary judgment is warranted on behalf of the City on this claim because the Plaintiff has failed to show that the Winter Park Police Department's handcuffing policy and the way it is interpreted is unconstitutional.

The Plaintiff's Motion for Summary Judgment:

The Plaintiff next moves for partial summary judgment with respect to his claims against the City. The

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[3]. The Plaintiff also states that the Winter Park Police Department had the following policy:

> Although an officer has discretion not to handcuff a suspect behind his back, there is no requirement to do so, the written policy discourages him to do so, and an officer has no fear of an internal investigation on his decision, as his decision is unfettered except where done to deliberately inflict pain or punishment.

(Doc. No. 76 at 30). It appears that this is the Plaintiff's interpretation of the Winter Park handcuffing policy and the way in which such policy is construed. The Court has not found such policy in the record. Even if a written policy such as the one described existed, it does not appear that it would be unconstitutional on its face because it

Plaintiff first moves for summary judgment on the issue of whether he complied with the presuit requirement for bringing this lawsuit. The City concedes that the Plaintiff complied with this requirement. Accordingly, summary judgment is granted in favor of the Plaintiff on this issue.

The Plaintiff next seeks summary judgment on the issue of whether or not Chief of Police Ball was a final policy maker and on the issue of whether or not the City ratified the conduct of the police officers. Because summary judgment is being granted in favor of the City on the unlawful arrest and excessive force claims, these issues are moot. Accordingly, summary judgment is denied on these issues.

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would give officers on the scene the discretion to determine, based on the circumstances to which they are confronted, whether an individual should be handcuffed in the back.

[6]. Even if Chief of Police Ball's statements were considered, such statements do not create an unconstitutional policy. In essence, Chief of Police Ball stated that an officer has discretion at the time of an arrest to determine whether an individual should be handcuffed in the back. (Doc. No. 63 at 35-36). Providing officers with such discretion is not unconstitutional.

Conclusion

Based on the foregoing, the Court rules as follows:

1) Defendant City of Winter Park's Motion for Summary Judgment (Doc. No. 50) is **GRANTED IN PART AND DENIED IN PART** in accordance with this Order. Summary judgment is **GRANTED** in favor of the City of Winter Park on the Plaintiff's unlawful arrest and excessive force claims.

2) Motion for Summary Judgment of Defendants, Wayne M. Farrell and Lois (Lorri) Szczepanski (Doc. No. 43) is **DENIED.**

3) Plaintiff's Motion for Partial Summary Judgment Against the Defendant, City of Winter Park (Doc. No. 60) is **GRANTED IN PART AND DENIED AS MOOT IN PART** in accordance with this Order.

DONE AND ORDERED at Orlando, Florida, this 7th day of June, 2000.

"s/_____"
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

(3)

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-651

In the Supreme Court of the United States

JOE JOHN RODRIGUEZ,

Petitioner,

v.

WAYNE W. FARRELL AND LOIS SZCZEPANSKI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Did The Eleventh Circuit Correctly Hold That Sgt. Farrell Did Not Use Excessive Force When He Handcuffed Petitioner?

A. Is Handcuffing A Suspect Behind His Back And Raising His Arms In A Compliance Technique Excessive If The Handcuffing Causes Serious Injury To The Suspect's Arm, Due to The Suspect's Pre-Existing Elbow Sugery, Where The Arresting Officer Does Not Know About The Pre-Existing Injury Prior To Handcuffing The Suspect?

B. Is It Excessive Force For The Officers To Leave A Suspect's Handcuffs On For 15 Minutes After The Arrest, Until The Suspect Arrives At The Police Station, Where The Arresting Officer Does Not Know About The Suspect's Pre - Existing Elbow Surgery?

C. Does The Opinion Below Conflict With Decisions Of Other Courts of Appeal?

II. Did The Eleventh Circuit Correctly Hold That Sgt. Farrell Is Entitled To Qualified Immunity?

A. Is The Law Sufficiently Clearly Established, So As To Defeat An Officer's Claim Of Qualified

Immunity, That Handcuffing A Suspect Behind His Back And Raising his Arms In A Compliance Technique Is Excessive Force Where The Handcuffing Causes Serious Injury To The Suspect's Arm, Due To The Suspect's Pre-Existing Elbow Injury, If The Arresting Officer Did Not Know About The Pre-Existing Elbow Surgery Prior To Handcuffing The Suspect?

B. Would Every Reasonable Police Officer Inevitably Conclude That Handcuffing A Suspect Behind His Back And Raising His Arms In A Compliance Technique Was Excessive Where The Handcuffing Causes Serious Injury To The Suspect's Arm, Due to The Suspect's Pre-Existing Injury, If The Arresting Officer Does Not Know About The Pre-Existing Elbow Surgery Prior To Handcuffing The Suspect?

C. Is The Law So Clearly Established, Sufficient To Defeat An Officer's Claim Of Qualified Immunity, That An Arresting Officer Uses Excessive Force By Leaving a Suspect's Handcuffs On For 15 Minutes After The Arrest, Until The Suspect Is Transported To The Police Station, If The Arresting Officer Does Not Know About The Suspect's Pre-Existing Elbow Surgery?

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STATEMENT OF THE RELEVANT FACTS

"On September 8 1995 at 12:10 a.m., Officer [Lori] Szczepanski ('Officer Szczepanski') pulled over a vehicle driven by Patricia Foulkes ('Ms. Foulkes'): the vehicle had a broken tag light. [Petitioner Joe John] Rodriguez ['Rodriguez'] was the only passenger in Ms. Foulkes's car. Shortly after the initial traffic stop, Sgt. [Wayne] Farrell ['Sgt. Farrell'] arrived to provide backup." *Rodriguez v. Farrell*, 280 F.3d 1341, 1343 (11th Cir. 2002), *rehearing denied*, 294 F.3d 1276 (11th Cir. 2002); *See* Pet. App. A at 15. Contrary to Petitioner's Statement of Relevant Facts, these officers did not have other backups or another canine officer at the scene. App. B at 3a (Deposition of Sgt. Farrell at 5; Sgt. Farell was the only backup); App. C at 11a-13a (Deposition of Officer Szczepanski at 9; 60) (Officer Szczepanski, who had arrested the driver, was a canine officer; Sgt. Farrell was her only backup).

"Officer Szczepanski directed Rodriguez to get out of the vehicle. Rodriguez complied and walked around freely beside the vehicle. But, before Rodriguez got out of the vehicle, he removed his sling. Because Rodriguez was wearing a long-sleeve shirt (after he had removed his sling), nothing outwardly indicated that Rodriguez's arm was injured." *Rodriguez* , 280 F.3d at 1343; *See* Pet. App. A at 15; App. B at 3a-4a (Deposition of Sgt. Farrell at 16); App. D at 26a-28a (Deposition of Petitioner at 280-281). Officer Szczepanski then turned her attention to Ms. Foulkes, whom she arrested on narcotics charges.

The officers conducted a check for outstanding warrants on Rodriguez. Sgt. Farrell became "convinced" that Rodriguez was wanted in an outstanding warrant and decided

to arrest him. *Rodriguez*. 280 F.3d at 1345.[1] Sgt. Farrell then began to handcuff Petitioner.

Contrary to Petitioner's assertion, Sgt. Farrell did not know (and was not "on notice") that Petitioner had recently had surgery on his elbow or that pins had been installed to assist in the healing of Petitioner's elbow when he handcuffed Rodriguez. App. B at 3a-4a (Deposition of Sgt. Farrell at 16). Petitioner admitted below that he removed his sling before Sgt. Farrell approached him, *See Rodriguez*, 280 F.3d at 1343; App. A at 15; App. E at 35a (Affidavit of Petitioner at p. 3, par. 10), and that he never told Sgt. Farrell that he had recently had surgery on his elbow. *Rodriguez*, 294 F.3d at 1278 n.2; Pet. App. A at 46; App. D at 18a-19a (Deposition of Petitioner at 191-192); App. F at 48a-49a (Affidavit of Sgt. Farrell at p. 5, par. 9).

As Sgt. Farrell pulled Plaintiff's arm behind him, Petitioner "attempt[ed] to pull it forward." App. D at 19a (Deposition of Petitioner at 191). Petitioner attempted to "restrain [Sgt. Farrell] from bending it any more than he was doing." App. D at 20a (Deposition of Petitioner at 192).

The Eleventh Circuit summed up each witness' testimony about the ensuing events:

> In his deposition, Plaintiff testified that he screamed in pain and screamed that his arm was hurting when Sgt. Farrell applied the pain

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[1] Since Petitioner is not seeking review of the lawfulness of the arrest or Office Szczepanski's actions, Respondent will not address these issues. For a discussion of the arrest claim below. *See*, *Rodriguez*, 280 F.3d at 1343 - 1351; Pet. App. A at 13-35.

> compliance handcuffing technique described in our original opinion. Also in that deposition, Plaintiff unequivocally states that, even after the handcuffing began: "I didn't even tell him then [that my arm was specifically injured], I was just telling him that he was hurting my arm." In contrast, Sgt. Farrell testified in his deposition that he simply handcuffed Plaintiff behind his back: he denies applying any pain compliance handcuffing technique when arresting Plaintiff or that Plaintiff screamed, in pain or otherwise. But, Sgt. Farrell does note that Plaintiff did ask him to be careful after Farrell started the handcuffing because his (Plaintiff's) arm was injured. We take the best set of facts for Plaintiff.

Rodriguez, 294 F.3d at 1278 n.2; *see*, Pet. App. A at 46; App. B at 4a-5a (Deposition of Sgt. Farrell at 16-17); App. D at 16a-20a (Deposition of Petitioner at 189-192); App. F at 48a-49a (Affidavit of Sgt. Farrell at p. 4, par. 9) "After arriving at the station roughly 10 minutes later, Rodriguez was placed in a holding cell and his cuffs were removed." *Rodriguez*, 280 F. 3d at 1345; *See* Pet. App. A at 20; App. D at 25a (Deposition of Petitioner at 216).

Unfortunately, "Rodriguez's earlier surgery made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results." *Rodriguez*, 280 F.3d at 1352.[2] Indeed,

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[2] Petitioner's medical evidence, viewed in the light most favorable to the Petitioner, was that the application of the

Rodriguez conceded that he would not have suffered any injury to his elbow if he had not recently had surgery on his arm. App. D at 28a (Deposition of Petitioner at 323).

Despite these tragic results, Sgt. Farrell did not use constitutionally impermissible excessive force and did not violate clearly established law.

ARGUMENT IN OPPOSITION TO PETITION

I. The Eleventh Circuit Correctly Held That Sgt. Farrell Did Not Use Excessive Force When He Handcuffed Petitioner.

A. The Eleventh Circuit Correctly Held That The Arresting Officer Did Not Use Constitutionally Excessive Force When He Handcuffed The Suspect Behind His Back And Raised His Arms To Secure The Suspect's Compliance, Even Though The Handcuffing Caused Serious Injury To The Suspect's Arm Due To The Suspect's Pre-Existing Elbow Injury, Because the Arresting Officer Did Not Know About the Pre-Existing Surgery Prior To Handcuffing The Suspect.

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handcuffs caused Petitioner's permanent injuries. There was no evidence offered to prove the assertion that leaving Petitioner in handcuffs for an additional fifteen minutes caused additional physical damage.

The Eleventh Circuit correctly held that "ordinary, reasonable force 'does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.'" *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) (quoting and construing *Rodriguez*, 280 F.3d at 1351 - 1352). Contrary to Petitioner's assertions, certiorari would be improvident because the decision below follows a long line of federal precedent and does no violence to the rulings of this Court.

The Supreme Court has held that "[t]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Officers are entitled to use "a minimal amount of force," *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000), to arrest a suspect - such as routine handcuffing. *Atwater v. City of Lago Vista*, 522 U.S. 318, 354 -355, 121 S. Ct. 1536, 1558, 149 L. Ed. 2d 549 (2001) (officer with probable cause to believe suspect committed "even a very minor criminal offense in his presence...may, without violating the Fourth Amendment, arrest the offender"; Atwater's arrest was a"normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station."); *Soares v. State of Connecticut*, 8 F.3d 917, 921 (2d Cir. 1993); *Owens v. Colburn*, 860 F. Supp. 966 (N.D.N.Y. 1994); *Pritzker v. City of Hudson*, 47 F.Supp.2d 303, 310-311 (N.D.N.Y. 1999). The handcuff technique utilized by Sgt. Farrell is a relatively common, ordinarily non excessive technique to detain an arrestee "even if he does not attempt to resist or flee." *See Owens v. Colburn*, 860 F.Supp. at 972.

The Court below was faithful to this Court's Fourth Amendment precedents when it recognized that Sgt. Farrell

had a split second to decide whether Petitioner's screaming during the course of a midnight narcotics arrest after a traffic stop, amounted to resistance; whether to release this narcotics suspect during the handcuffing procedure; and whether such release might pose a risk of flight or to the safety to the officers. Sgt. Farrell testified that he handcuffed Petitioner behind his back, pursuant to Department policy, because he deemed it necessary for safety reasons. App. F at 48a-49a (Affidavit of Sgt. Farrell, p. 5, par. 9).

In this context, the Eleventh Circuit correctly answered the threshold inquiry that a court must undertake in a qualified immunity analysis when it held that Petitioner's evidence, if true, would not establish a constitutional violation. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In *Saucier,* the Supreme Court held:

> Because "police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation," id., at 397, 109 S. Ct. 1865, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective, id., at 396, 109 S. Ct. 1865. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. id., at 393, 396, 109 S. Ct. 1865. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, "requir[ing] careful attention to the facts and circumstances of each particular case,

> including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." id., at 396, 109 S. Ct. 1865. If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

Saucier, U.S. at 205 (citing *Graham v. Conner*, 490 U.S. at 386).

The Eleventh Circuit properly assessed Sgt. Farrell's "split second" decision to handcuff Petitioner and to use the pain compliance technique to secure Petitioner's cooperation. The Court of Appeals accurately viewed Sgt. Farrell's decision through the eyes of a reasonable police officer who did not know Appellee had recently had elbow surgery. *See Sherrod v. Berry*, 856 F.2d 802, 807 (7th Cir. 1988) (en banc) (the only evidence which is admissible against an officer in an excessive force case, is "the very information known to the officer at the time of his or her actions.") Thus, the Eleventh Circuit appropriately held that Sgt. Farrell's split - second decision to continue handcuffing a narcotics suspect being arrested during a midnight traffic stop, and to raise Petitioner's arms behind his back to secure compliance with the arrest, was not objectively unreasonable.

The Eleventh Circuit stated:

> As we noted in our original opinion, a police officer need not credit everything a suspect tells him. *See Marx v. Gumbinner*, 905 F.2d

1503, 1507 n. 6 (11th Cir. 1990). This idea is especially true when the officer is in the process of handcuffing a suspect. As another federal court recently noted, statements by suspects claiming (at the time of their arrest) to have pre-existing injuries are, "no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all and, if they must be restrained in that manner, would prefer that the handcuffs be in front." *Caron v. Hester,* No. CIV. 00-394-M, 2001 WL 1568761, at *8 (D.N.H. Nov. 13, 2001) (granting officer, who handcuffed suspect behind suspect's back, qualified immunity on excessive force claim despite officer's alleged knowledge--based upon suspect's testimony that he told the officer--of suspect's pre-existing injury when "[the officer] was not confronted with any objective manifestation of [the suspect's] claimed shoulder problem"). In the context of this case--a case in which Sgt. Farrell, after midnight on the side of the road, reasonably believed that Plaintiff (who, as we discussed in our original opinion, had no obvious signs of injury specifically to his arm) was a fugitive who had evaded capture, Sgt. Farrell's alleged discounting of Plaintiff's arm-injury claim (a claim not made until after Sgt. Farrell began to arrest Plaintiff despite the fact that he had been in Sgt. Farrell's company for roughly 30 minutes when the handcuffing began) was reasonable. *Cf. Jackson v. City of Bremerton,* 268 F.3d 646, 652 (9th Cir. 2001) (in arrest for failing to disperse, pushing suspect to the

> ground and kneeling on her back not excessive force despite fact that suspect informed officer of her pre-existing back and shoulder injuries); *Morreale v. City of Cripple Creek*, No. 96-1220, 1997 WL 290976, at *1, 5-6 (10th Cir. May 27, 1997)(in arrest for driving with a suspended license, milder handcuffing of suspect behind her back not excessive force despite suspect's request that she be handcuffed in front to avoid aggravating pre-existing shoulder injury).

Rodriguez, 294 F.3d at 1278; *See* Pet. App. A at 48. The Eleventh Circuit added:

> Perhaps, if Plaintiff, *before* the physical part of the arrest began, had also told Sgt. Farrell that Plaintiff's arm was injured, we would be more inclined to conclude that the Constitution required Sgt. Farrell to credit that statement. But, that is not what occurred here.

Rodriguez, 294 F.3d at 1278 n. 3; *See* Pet. App. A at 48.

The Eleventh Circuit's decision below is consistent the decisions of other federal courts which have held that the aggravation of a suspect's pre-existing injury does not elevate a routine use of force into constitutionally excessive force. In *Owens v. Colburn*, 860 F.Supp. 966 (N.D.N.Y. 1994), the Plaintiff contended that Police Officer Colburn "[i]n the process of . . . handcuff[ing the plaintiff], 'severely and abruptly'...pulled...[plaintiff']s hands...behind him, aggravating his preexisting spinal condition." *Id.* at 968. The *Owens* court granted summary judgment to defendant Officer Colburn and held that Officer Colburn did not use excessive

force. There, as here, "the facts [we]re undisputed as to Colburn's lack of knowledge of plaintiff's pre-existing...injury." *Id.* at 972. The court emphasized that a police officer's routine handcuffing of a suspect without "*actual* knowledge of plaintiff's preexisting condition... do[es] not rise to the level of a constitutional violation in the absence of visible injuries, complaints, or requests for medical treatment." *Id.* at 973 (emphasis added). *Compare McDermott v. Town of Windham,* 204 F.Supp.2d 54, 65 (D. Me. 2002) (". . . the fact that [Officer] Cox continued to place McDermott in handcuffs despite her telling him that she suffered from osteoporosis, without more, does not rise to anywhere near the level of excessive force.")

In *Pritzker v. City of Hudson*, 47 F.Supp.2d 303, 310-311 (N.D.N.Y. 1999), plaintiff suffered from a preexisting hand injury at the time that Officer Moon handcuffed him tightly. "Moon was aware that plaintiff had a preexisting injury to his wrists." *Id.* at 311. As in the case at bar, prior to Officer Moon handcuffing the plaintiff, "plaintiff . . . never informed Moon of the severity of that injury." *Id.* Officer Moon was entitled to qualified immunity on plaintiff's excessive force claim, because, "[r]egardless of whether there was a clearly established right not to be handcuffed, under the facts and circumstances of this case it was reasonable for Moon to believe that he did not violate plaintiff's rights." *Id.*

Similarly, in *Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1996), the Seventh Circuit held that police officers, who held down a previously resisting suspect who suffered from pre-existing illnesses which left him susceptible to suffocation, did not use excessive force even when, as a result of the officers' use of force, the suspect suffocated. *Id.* at 593-94. "That force, it turned out when combined with Mr.

Phillips' other health problems, resulted in Mr. Phillips' death." *Id.* at 594. "But, **the question is not whether the officers' actions aggravated an undiscovered injury or condition,** but whether their actions were objectively reasonable under the circumstances." *Id.* (emphasis added).

In *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996), police officers arrested the subject after a violent twenty minute struggle. They then hog-tied the subject. This caused the subject, who could not breathe, to suffocate. *Id.* at 1488-1489.

The Eleventh Circuit held that the arresting officers were entitled to qualified immunity as to the claims of mistreatment in custody, *Id.* at 1491-92, and excessive force. *Id.* at 1492. The officers were not responsible for the tragic consequences of the use of this restraint technique in the absence of some evidence that they knew that the suspect would suffocate. *Id.* at 1491-92.

In *Ford v. Retter*, 840 F.Supp. 489 (N.D. Ohio 1993), a police officer threw an arrestee to the ground. *Id.* at 490. The arrestee had previously broken his finger. The arrestee re-broke his finger in the fall. *Id.* The Court held that the arrestee failed to establish a claim for excessive force. *Id.* at 491.

In *Moore v. Gwinett County*, 967 F.2d 1495, 1497 (11th Cir. 1992), a police officer restrained Mrs. Moore, who was 8 months pregnant, by wrapping his arms around her abdomen. *Id.* Her child was stillborn. *Id.* Mrs. Moore and her husband testified "that the child's appearance at birth led them to believe that he may have been injured." *Id.*

The Court held:

> This case involves none of the indications of excessive force recognized in our past cases...Under these circumstances, common sense dictates a finding that Officer Meadow's use of force was reasonable according to established standards. Even adopting Moore's version of the facts, there is no suggestion that Meadows went beyond firmly taking hold of Moore and contacting her abdomen in the process. The act of physically holding back a misdemeanor suspect who is attempting to leave the scene, even given her pregnant condition, cannot sensibly be considered disproportionate as measured by this circuit's precedents. Accordingly, ***we find no excessive force*** sufficient to indicate that Officer Meadows violated any clearly established constitutional right.

Id., at 1499 (emphasis added).

B. The Eleventh Circuit Correctly Held That The Arresting Officer Did Not Use Constitutionally Excessive Force By Leaving The Suspect's Handcuffs On for 15 Minutes After The Arrest, Until The Suspect Was Transported To The Police Station, Because The Arresting Officer Did Not Know About The Suspect's Pre-Existing Elbow Surgery.

The Court should not grant Certiorari because the Court of Appeals correctly decided that Sgt. Farrell used permissible force when he left Petitioner handcuffed behind his back during the fifteen minute drive to the police station. Petitioner admits that, even after he was handcuffed, he never told Sgt. Farrell that he had recently had surgery on his elbow. *Rodriguez*, 294 F.3d at 1278 n.2; Pet. App. A at 46. Moreover, Petitioner "never asked Sgt. Farrell to handcuff him in front of his body, instead of behind his back. Nor did P[etitioner] ask for medical assistance." *Rodriguez*, 294 F.3d at 1279; Pet. App. A at 48-49. At the station, the officers released Petitioner from his handcuffs and gave him his medication.

As noted in the Eleventh Circuit's opinion denying rehearing, this case does not involve any of the brutal handcuffing techniques or gratuitous delays in removing the handcuffs despite requests by the suspect. *Id.* Sgt. Farrell's routine handcuff technique and the brief period during which Petitioner was cuffed distinguishes this case from the decisions which Petitioner erroneously asserts are in conflict with the opinion below. *Compare*, *Grooms v. Dockter*, 76 F.3d 378, 1996 WL 26917, *1 (6th Cir. 1996) ("Grooms repeatedly told officers that his handcuffs are too tight"; officers left Grooms in handcuffs in police station); *Kostrzewa v. City of Troy*, 247 F.3d 633, 637-638, 640-641 (6th Cir. 2001) (cause of action for excessive force stated by complaint alleging tight handcuffing, that officers drove recklessly to aggravate plaintiff's pain and that officers re-cuffed plaintiff's already visibly swollen hands); *Bastien v. Goddard*, 279 F.3d 10, 12-13 (1st Cir. 2002)("Appellant immediately complained that the handcuffs placed on him were too tight and causing pain. No adjustments were made"; "[a]t the police station, appellant remained handcuffed for approximately four more hours, although he repeatedly

requested that the cuffs be removed or loosened."). Moreover, the Eleventh Circuit's decision is consistent with the decisions of other federal courts which have held that it is not excessive force for an officer, without "objective" knowledge of the suspect's pre-existing injury, to briefly continue to handcuff the suspect, *see Rodriguez,* 294 F.3d at 1278 (*citing, Morreale v. City of Cripple,* No. 96-1220, 1997 WL 290976, at *1, 5-6 (10th Cir. May 27, 1997) and *Caron v. Hester,* No. CIV. 00-394-M, 2001 WL 1568761, at *8 (D.N.H. Nov. 13, 2001)), or to use minor force to control the suspect. *Id. (citing, Jackson,* 268 F.3d at 652); *See also Owens*, 860 F.Supp. at 973; *Moore v. Gwinett County*, 967 F. 2d at 1497.

C. The Opinion Below Does Not Conflict With Decisions Of Other Courts Of Appeal.

Sgt. Farrell's lack of knowledge of Petitioner's pre-existing elbow surgery, *see* App. B. at 3a-4a (Deposition of Sgt. Farrell at 16), distinguishes this case from some of the decisions which Petitioner claims are in conflict with the opinion below. *Compare Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1992) (fact question existed as to whether officer knew plaintiff had an injured shoulder; plaintiff begged not to be handcuffed because of injured shoulder); *Guite v. Wright*, 147 F.2d 747, 750 (8th Cir. 1995) (officers made warrantless entry into a home to arrest a suspect; the officers pushed the suspect's father despite the visible sling that the father was wearing on his shoulder).

Moreover, the Eleventh Circuit's decision is not in conflict with the decisions which Petitioner relies on, in which handcuffing was part of a more brutal seizure. *See Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443

(1989). For example, in *Fundiller v. The City of Cooper City*, 777 F.2d 1436, 1441 (11th Cir. 1985), the complaint alleged that the officer "began firing shortly after drawing his weapon. Only after being hit at least once did Fundiller reach beneath the car seat where his weapon was concealed. The two shots he fired, it is contended, were in self-defense... [O]ther individual police officers arrived on the scene just after the shooting. Instead of rendering aid, the officers dragged appellant from his car and, leaving him face down on the ground, shackled his hands behind him. Several officers stated that they hoped appellant would bleed to death and shouted obscenities at him while he lay on the ground moaning in pain." *Id; See also LaLonde v. County of Riverside*, 204 F.3d 947, 952 (9th Cir. 2000).

The opinion below also does not conflict with the decisions of the various Courts of Appeal, cited by Petitioner, in which unusually tight handcuffing or gratuitous delays in removing the handcuffs injured the suspect. *See Grooms v. Dockter*, 76 F.3d 378, 1996 WL 26917, *1; *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997) (fact question as to whether officer used "too tight handcuffing"); *Kostrzewa v. City of Troy*, 247 F.3d at 637- 638, 640; *Palmer v. Sanderson*, 9 F.3d 1433, 1435-1437 (9th Cir. 1993) (plaintiff was cuffed "so tightly that he suffered pain and bruises"); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989)- (handcuffs put on in "abusive manner," bruising plaintiff's wrists and upper arm); *Goff v. Bise*, 173 F.3d 1068, 1074 (9th Cir. 1999) (painful handcuffing and rough treatment resulting in a torn rotator cuff); *Johnson v. Morel*, 876 F.2d 477, 478 (5th Cir. 1989), *overruled on other grounds, Harper v. Harris County, Tex.*, 21 F.3d 597 (5th Cir. 1994) ("Morel applied the handcuffs so tightly that they not only broke the skin, but left apparently permanent scars on Johnson's wrists and disabled him from his employment

for about two weeks."); *LaLonde v. County of Riverside*, 204 F.3d at 952 ("For twenty to thirty minutes, LaLonde sat on the couch with his hands handcuffed and the pepper spray burning his face. LaLonde testified 'when my wrists started to really bother me bad, I said something about it.' LaLonde told the officers, 'These handcuffs are too tight. They're cutting off my circulation'."); *Bastien v. Goddard*, 279 F.3d at 10,12-13. *See* discussion at pp. 13-14 above.

To the contrary, Rodriguez conceded below that he would not have suffered any injury if he had not recently undergone elbow surgery. *See* App. D at 28a (Deposition of Petitioner at 323). The unfortunate consequences here were the result of Petitioner's pre-existing condition – not brutal handcuffing. *Id.*

The Eleventh Circuit's decision is also not in conflict with the cases, cited by Petitioner, in which the handcuffing was excessive because it was not incident to a lawful arrest or was not necessary to further any legitimate law enforcement interest. *Heitschmidt v. City of Houston*, 161 F.3d 834, 838 (5th Cir. 1998) (plaintiff was painfully handcuffed and denied access to bathroom for four hours during a search and seizure); *Johnson v. Morel*, 876 F. 2d at 478 (officer arrested Johnson for no reason after screaming racial epithets at him; case is compared to "'night rider' cases of an earlier day").

Because precedent is clear that Sgt. Farrell did not use excessive force, the Court should deny Petitioner's Petition for a Writ of Certiorari.

II. The Eleventh Circuit Correctly Held That Sgt. Farrell Is Entitled To Qualified Immunity.

A. The Eleventh Circuit Correctly Held That Respondents Are Entitled To Qualified Immunity Because The Law Is Not Sufficiently Clearly Established That Handcuffing A Suspect Behind His Back And Raising His Arms To Secure The Suspect's Compliance Is Constitutionally Excessive Force, Even Though The Handcuffing Caused Serious Injury To The Suspect's Arm Due To The Suspect's Pre-Existing Elbow Injury, Since The Arresting Officer Did Not Know About The Pre-Existing Elbow Surgery Prior To Handcuffing The Suspect.

B. The Eleventh Circuit Correctly Held That Respondents Are Entitled To Qualified Immunity Because Every Reasonable Police Officer Would Not Inevitably Conclude That Handcuffing A Suspect Behind His Back And Raising The Suspect's Arms To Secure The Suspect's Compliance Was Excessive, Even Though The Handcuffing Caused Serious Injury To The Suspect's Arm Due To The Suspect's Pre-Existing Elbow Injury, Since The Arresting

Officer Did Not Know About The Suspect's Pre-Existing Elbow Surgery Prior to Handcuffing The Suspect.

C. The Eleventh Circuit Court Held That Respondents Are Entitled To Qualified Immunity Because The Law Is Not So Clearly Established That An Arresting Officer Used Excessive Force, By Leaving A Suspect's Handcuffs On For 15 Minutes After The Arrest, Until The Suspect Was Transported To The Police Station, Since The Arresting Officer Did Not Know About the Suspect's Pre-Existing Elbow Surgery.

In the present case, the Court should deny Certiorari because the Eleventh Circuit rightly found, "[i]n the alternative...that Sgt. Farrell is entitled to qualified immunity on the excessive force claim." *Rodriguez*, 280 F.3d at 1353 n.21. This holding is also consistent with decisions of the Supreme Court and the various Circuits.

In *Saucier*, the Supreme Court noted that "[if] no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201; 121 S. Ct. at 2156.

An officer is entitled to qualified immunity unless the unlawfulness of his conduct "is apparent in light of pre-existing law." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). An officer is not entitled to qualified immunity only if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand what he is doing violates that right." *Id.* "The relevant question...is the objective (albeit fact specific) question of whether a reasonable officer could have believed [his actions to be lawful] in light of clearly established law and the information the searching officers possessed." *Id.* 483 U.S. at 640, 107 S.Ct. at 3040.

In *Saucier*, the Supreme Court held:

> [T]here is no doubt that *Graham v. Connor, supra,* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640, 107 S. Ct. 3034. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999); ("[A]s

> we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.")

Saucier, 533 U.S. at 201-202; 121 S. Ct. at 2156.

"Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.*, 533 U.S. at 206, 121 S. Ct. at 2158 (*quoting Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000)). "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." *Id.*, 533 U.S. at 208, 121 S. Ct. at 215.

In the present case, the Eleventh Circuit correctly held that Sgt. Farrell is entitled to qualified immunity because every reasonable officer would not have inevitably concluded that handcuffing the Petitioner was excessive. *See Atwater*, 522 U.S. at 354-355, 121 S. Ct. at 1558. As the opinions discussed above at pp. 7-12 reflect, the law is not clearly established that a police officer arresting a narcotics suspect during a midnight traffic stop is prohibited by the Fourth Amendment from handcuffing the suspect behind his back, if the officer does not know that the suspect has a pre-existing serious injury or exhibits "no obvious signs of injury to his arm." *Rodriguez*, 294 F.3d at 1278; Pet. App. A at 47. The *Owens* court recognized that "'[n]either the Supreme Court nor the Second Circuit has established that a person has the right not to be handcuffed in the course of a particular arrest, even if he does not resist or attempt to flee." *Owens*, 860 F.Supp. at 972 (*quoting Soares v. State of Connecticut*, 8

F.3d 917, 921 (2d Cir. 1993)); *McDermott*, 204 F.Supp. 2d at 64 (quoting holding in *Soares* that "the right in question [was] the right not to be handcuffed in the situation presented to the arresting officers.").

As discussed above at pp. 7-10, the law is also not clearly established that an officer, who utilizes an ordinary non-brutal handcuffing technique, must discontinue handcuffing the subject because the suspect cries out. Moreover, as noted above at pp. 13-16, the law is not clearly established that leaving such a subject in handcuffs for just fifteen minutes, until he is transported to the police station, violates the Constitution.

Since pre-existing case law did not clearly establish that Sgt. Farrell utilized excessive force when he arrested Petitioner, the Eleventh Circuit properly determined that Sgt. Farrell is entitled qualified immunity.

CONCLUSION

Since the Eleventh Circuit's opinion was correctly decided and does not conflict with decisions in other Circuits, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted:

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APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 98-997-CIV-ORL-19A

JOE JOHN RODRIGUEZ, Plaintiff, v. CITY OF WINTER PARK, FLORIDA, a municipal corporation, DOUGLAS M. BALL, WAYNE W. FARRELL, and LOIS SZCZEPANSKI, Defendants.	)

Deposition Of:	Wayne W. Farrell
Taken By:	Plaintiff
Date:	April 29, 1999
Time:	1:20 p.m.
Location:	2600 Maitland Center Parkway Orlando, Florida
Reported By:	Elizabeth M. Love Registered Professional Reporter

Deposition excerpts of Wayne W. Farrell, 4/29/99

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particular case?

A I volunteered to back up officer Szczepanski at a traffic stop at her request for another officer.

Q And did dispatch contact you or did she contact you directly or how did you hear about it?

A She asked for a backup, and I heard it, and I volunteered to accept that particular assignment.

Q Okay. In other words, you called dispatch and said you were going to take it?

A Correct.

Q And you were her supervisor; is that correct?

Q That particular night, yes.

Q And just to clarify, we're talking about September 8, 19957

A Yes, sir.

Q You get to the area where she has the other carstopped and what do you observe?

A She's standing near a vehicle and there are, I believe, two other people standing near that vehicle.

Q Okay. Do you recall one way or the other whether or not officer Szczepanski had a rider with her that night?

A There was no one at the scene with her, so I don't believe she did.

MR. GUTMACHER: Just for the record, what I'm going to do is use the same exhibits with the same numbers as

* * *

[p.16]

A She looked at him. I don't know -- I don't recall what parts she checked, no, sir.

Q Do you recall if he had to roll up his shirt or take off his shirt in order for her to see?

A something had to be rolled up because he had it on his upper arm, so something had to be moved to look at it on at least one.

Q You don't recall whether she looked at one or more than one at this particular time?

A I don't recall what she did. I know I looked at one.

Q Okay. Did you notice on his left arm any bandages? Gauze?

A At the scene?

Q Yes, sir.

A No, sir.

Q Did you notice at any time that his left arm was in a sling?

A I didn't see a sling on him at all.

Q Did he indicate to you prior to your handcuffing him that he had been involved in the motorcycle accident?

A No, sir.

Q That was only later at the station?

A No, sir. It was during. I knew there was an injury. I just didn't know it was a motorcycle accident.

Q Okay. And I'm a little confused. When you say you knew there was an injury, how did you know there was an injury?

A When I was putting his arm behind his back to handcuff him, he went, oooooh, be careful, I have an injured arm, or something to that effect.

Q Did he seem to be in pain at the time that you were handcuffing him?

A He didn't cry out. He just said, oooooh.

Q He did not fall to his knees?

A No, absolutely not.

Q As officer Szczepanski's supervisor, did you have the right to overrule her decision to make an arrest?

A Yes, I have the authority to.

Q Do you feel that Joe Rodriguez is a common name?

MR. BEAMS: Object to the form.

A I couldn't tell you. I would have no idea.

Q Did you know that the height of the individual who had the warrant out for him was supposedly five foot six inches?

A No, sir.

Q Did you know that the weight of the individual who had the warrant out for him was supposedly 139 pounds?

A No, sir.

Q Did you know that the person who had the warrant

* * *

Deposition excerpts of Wayne W. Farrell, 4/29/99

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MR. BRAMS: The birth certificate?

MR. GUTMACHER: Yes.

Q Do you know one way or the other whether he had it in his possession that morning?

A I don't recall, sir.

Q Showing you what's been marked as Plaintiff's Exhibit 14, which were black and white copies of some identifications the plaintiff is claiming were in his possession that morning, do you recognize any of those as having seen any of those?

A No, sir. I don't recall those.

Q You saw my client at the -- did you transport my client to the station?

A Yes, sir, I did.

Q Okay. And he never complained while he was being transported about the handcuffs?

A I don't have a recollection of that.

Q Okay. And do you know -- did you place him in a holding cell at Winter Park station?

A Yes, sir.

Q And were you in view of him while he was in that cell for any length of time?

A For a short period of time.

Q During any of that time, did you see him or hear him complaining Of pain or indicating that he was in significant pain?

A No. He told me he was sore, but he didn't tell me that he was in excruciating pain, and it didn't look as if he

Q And did he indicate where he was sore?

A His arm.

Q His left arm?

A I don' t remember, sir.

Q Okay. And do you remember where on the arm?

A No, sir; wherever his injury was.

Q Okay. Is there anything pertinent about your observations in this particular case that you feel we have missed in this deposition?

MR. BRAMS: Let me object to the question. That is, I think, an unfair, open-ended question, and it's vague and ambiguous. There may be all sorts of things that are pertinent or

relevant or not pertinent or not relevant that he may or may not know about I mean if you want to ask him specific questions, that's fine, but I really don't see how he can answer a question that's that broad.

I'm not instructing him not to answer. You can go ahead and answer it. But I just want it to be very clear that, in my view, there's no way that Sergeant Farrell can answer that question in any knowledgeable

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 98-997-CIV-ORL-19A

JOE JOHN RODRIGUEZ,
Plaintiff,

v.

CITY OF WINTER PARK, FLORIDA, a municipal corporation, DOUGLAS M. BALL, WAYNE W. FARRELL, and LOIS SZCZEPANSKI,
Defendants.

Deposition Of:	Lorri Szczepanski
Taken By:	Plaintiff
Date:	April 29, 1999
Time:	9:40 a.m.
Location:	2600 Maitland Center Parkway Orlando, Florida
Reported By:	Elizabeth M. Love Registered Professional Reporter

Deposition excerpts of Lorri Szczepanski, 4/29/99

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Appearing on behalf of Defendants, Wayne W. Farrell and Lorri Szczepanski

ALSO PRESENT:
Wayne W. Farrell

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retained by counsel.)

* * *

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Foulkes under arrest at 12:24 a.m., do you have an estimate as to when Sergeant Farrell arrived, in the sense that five minutes before, ten minutes before, if you can?

A I believe he showed up prior to her arrest, but I don't have an exact time frame.

Q Okay. And you could not at this time block it off in the sense that at least five minutes, at least ten minutes?

A Well, if the stop occurred at 010 and she was arrested at 024, that's only 14 minutes, so it had to be within those two time frames.

Q Okay. Do you recall one way or the other whether you had a passenger or a rider in your vehicle?

A I don't recall having a rider.

Q Okay.

A I was a K-9 officer at the time.

Q And when you say you don't recall having a rider, would that answer be in the sense that, to your recollection, you did not have a rider?

A Correct.

Q You were in a marked unit and in full uniform?

A Yes.

Q And when Sergeant Farrell arrived, I assume he was in a marked unit and in full uniform?

A I believe he was.

* * *

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Q Okay. Do you recall how he was handcuffed in this particular instance?

A No.

Q To your knowledge, is there any reason why he should not have been told that he was about to be handcuffed prior to being handcuffed?

A Officer safety.

MR. BRAMS: Let me also just object to the question as being vague and ambiguous; lacking a predicate. The witness has already testified she's not the individual who handcuffed Mr. Rodriguez.

Q At the time that Mr. Rodriguez was handcuffed, the female was already handcuffed and in a unit; is that correct?

A Yes.

Q And the only other person in the immediate vicinity besides you and Sergeant Farrell was my client; is that correct?

A Yes.

Q Okay. And were you in close proximity to Sergeant Farrell at the time that he decided to cuff my client?

A I don't know where I was. I may have been searching the vehicle. I don't recall.

Q Okay. When was the first time that you found out that you had the wrong person?

A I don't recall.

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 98-997-CIV-ORL-19A

JOE JOHN RODRIGUEZ,
Plaintiff,

v.

CITY OF WINTER PARK, FLORIDA, a municipal corporation, DOUGLAS M. BALL, WAYNE W. FARRELL, and LOIS SZCZEPANSKI,
Defendants.

Volume I

The deposition of JOE JOHN RODRIGUEZ taken pursuant to notice on behalf of the Defendants, at the office of Eubanks, Hilyard & Bogan 20 N. Orange Avenue, Suite 600, Orlando, Florida, before Lisa K. Penkacik, Certified Shorthand Reporter, Registered Professional Reporter, CP-CM, and Notary Public, State of Florida at Large.

APPEARANCES:

JON H. GUTMACHER, ESQUIRE

200 N. Thornton Avenue
Orlando, Florida 32801

On behalf of the Plaintiff.

CRAIG L. BRAMS, ESQUIRE
Wyatt & Tolbert
2600 Maitland Center Parkway, Suite 170
Maitland, Florida 3751

On behalf of the Defendants Sergeant Farrell and Officer Szczepanski.

* * *

[p.189]

A. She was looking in it. She was still searching in it.

Q. Did you have your eyes on Officer Szczepanski when this was happening?

A. No, I was looking at the floor and in pain.

Q. Is it correct, then, that you were handcuffed before you had any conversation with Sergeant Farrell about your physical problem?

A. I'm sorry?

Q. Is it correct, that you were handcuffed by Sergeant Farrell before you had any conversation about your

physical problems?

A. No, he was asking me about my medication and my bag, what it was for and I told him a motorcycle accident.

Q. And then he asked you about tattoos, correct?

A. Yes.

Q. And that is when you were showing him the tattoos that, according to your recollection, Sergeant Farrell began handcuffing you?

A. Yes.

Q. So it is correct, then, that the conversation about your arm hurting took place after you were handcuffed as opposed to before you were handcuffed?

A. Oh, yeah, yes.

[p. 190]

Q. You and Sergeant Farrell did not have a conversation about your arm before he started handcuffing you, did you?

A. Yes, we did.

Q. I thought you just told me that it was when he started handcuffing you that you said, no, my arm hurts?

A. No, he said -- he asked me about my arm, my medication and what the problem was, motorcycle accident, okay. That was prior to him handcuffing me.

Q. You're adding some additional information now. Did he ask you, not just about the medication, but asked you why you were taking the medication?

A. He asked me what the medication was for.

Q. What did you say?

A. I said it was for a motorcycle accident, I just got out of the hospital.

Q. Did you give any information to Sergeant Farrell other than telling him that it was a motorcycle accident?

A. No.

Q. Did you tell him whether – did you tell him any of the specifics of your injury?

A. No.

Q. Is it correct, then, that you did not have any discussion with Sergeant Farrell about the specifics of your [p.191] injury until after he handcuffed you; isn't that true?

A. The specifics, you mean?

Q. You didn't tell Sergeant Farrell about the

details of your injury --

A. No.

Q. Until after he handcuffed you; is that correct?

A. I didn't even tell him then, I was just telling him that he was hurting my arm.

Q. And when Sergeant Farrell heard you say that he was hurting your arm, at that point he asked you what was wrong?

A. No, he just said, stop resisting.

Q. As you were being handcuffed and your arm was being pulled behind you, did you attempt to pull it forward?

A. Yeah.

Q. So there was a point in the procedure when you did attempt to resist the direction in which your arm was being pulled?

A. No.

Q. Well, is it true that in order to handcuff you, Sergeant Farrell was attempting to pull your arms behind your back?

[p.192]

A. He did.

Q. And during that procedure, even though you were unsuccessful, you did attempt to move at least your left arm in the opposite direction to prevent it from being pulled behind your back?

A. He was forcing it from the space that it was in. I was only limited and he was like trying to put it up behind my neck.

Q. And it caused discomfort to you?

A. Discomfort?

Q. Discomfort to you?

A. Oh, yeah.

Q. And when you felt the discomfort, you responded by attempting to move your arm forward; isn't that true?

A. No, he was trying to move it more than it could go.

Q. And were you attempting to prevent Sergeant Farrell from moving your arm by moving your arm forward, back into a position that was more comfortable?

A. No, I was trying to restrain him from bending

it any more than he was doing.

Q. You were trying to prevent Sergeant Farrell from moving your arm completely behind your back?

A. Up to my neck, behind my back.

[p.193]

Q. Is that correct? Is that what you were trying to prevent Sergeant Farrell from moving your arm further behind your back?

A. No. I am saying that he was pushing my arm further than it could go.

Q. I understand.

A. He was saying I was resisting. I told him I was not.

Q. I understand. Is it correct that when Sergeant Farrell began pushing your arm behind the back farther than it could go, you attempted, as best you could, to keep your arm in place and prevent it from being forced further than it could go?

A. No.

Q. So you did not in any way attempt to apply pressure in the opposite direction?

A. I couldn't.

Q. Did you attempt to do so?

A. No.

Q. Did -- after you were handcuffed, did you have any conversations with Sergeant Farrell about whether or not you were the right person who was arrested?

A. Yes.

Q. And what conversation did you have with him?

A. I told him he had the wrong person.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 98-997-CV-19A

JOE JOHN RODRIGUEZ,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WINTER PARK,	)
a municipal corporation, DOUGLAS M.	)
BALL, WAYNE W. FARRELL, and	)
LOIS SZCZEPANSKI,	)
Defendants.	)
	)

Volume II

Tuesday, July 20, 1999
9:10 a.m.

The deposition JOE JOHN RODRIGUEZ, taken pursuant to notice on behalf of the Defendants, at the Office of Eubanks, Hilyard & Bogan, 20 N. Orange Avenue, Suite 600, Orlando, Florida, before Lisa K. Penkacik, Certified Shorthand Reporter, Registered Professional Reporter, CP-CM, and Notary Public, State of Florida at Large.

Deposition excerpts of Joe John Rodriguez (v.II), 7/20/99

APPEARANCES :

JON H. GUTMACHER, ESQUIRE
200 N. Thornton Avenue
Orlando, Florida 32801

On behalf of the Plaintiff.

CRAIG L. BRAMS, ESQUIRE
Wyatt & Tolbert
2600 Maitland Center Parkway, suite 170
Maitland, Florida 3751

On behalf of the Defendants Sergeant Farrell and officer Szczepanski

* * *

[p.216]

A. Yes.

Q. Did you have any conversation with Miss Foulkes?

A. No.

Q. When you arrived at the police station, were the handcuffs removed?

A. Yes.

Q. So, you were placed in handcuffs for approximately five minutes between the time you were first handcuffed and the time that the handcuffs were removed at the police station?

A. No.

Q. What is inaccurate about that statement?

A. You asked me, it took five minutes to get to the police station.

Q. How long after you arrived at the police station were the handcuffs removed?

A. I'd say about 10 more minutes.

Q. Where were you during the i0 minute period?

A. Being escorted from the car into the police station, waiting at the police station, standing there until they went and got the key for the cells and then I was let go.

Q. So about 15 minutes after you were handcuffed, the handcuffs were taken off?

* * *

[p.280]

MR. GUTMACHER: What the procedures of St. Johns County are as to what he understands them to be.

Q. Based on what your officer's explanation to you was?

A. Yes.

Q. That there was a procedure that required you to be handcuffed behind your back?

A. Correct.

Q. Now, is it correct, then, on the evening when you were arrested by the Winter Park police, that you said you testified you were wearing a sweat shirt; is that correct?

A. Yes.

Q. And am I correct that that sweat shirt was a long sleeved sweat shirt?

A. Yes.

Q. And would it be correct that the scar on your arm was not visible to Sergeant Farrell, assuming he was the one that handcuffed you at the time the handcuffing procedure occurred?

A. Correct.

Q. And it would be correct that there wouldn't be any deformity that would have been visible to Sergeant Farrell when he reached out to grab your arm and to place [p.281]it behind your back; is that correct?

A. What do you mean "deformity"?

Q. Well, obviously you've held your arm out here today and showed us how that it does not align correctly and it does not appear symmetrical with your other arm, correct?

A. Correct.

Q. And would it be correct that that would not be visible through a sweat shirt as you were standing there out on the street that day to Sergeant Farrell prior to him placing you in handcuffs?

A. Correct.

Q. And I take it that you would agree, as far as you are aware in this case, that there is nothing as far as you personally have knowledge about that would lead you to believe that either of the Winter Park police officers were acting malicious towards you in placing you under arrest that day?

A. It was just the initial handcuffing of the twisting of the arm, I mean, because, you know, the way he grabbed it, and just flipped it behind me, twisting it while I was yelling; you know what I'm saying? I was in pain. It was like whoa, whoa, wait a minute, wait. I just like lost it. I was yelling out there in pain.

Q. I understand that. But going back to my

* * *

Deposition excerpts of Joe John Rodriguez (v.II), 7/20/99

[p.323]

Q. During those arrests, were you handcuffed with your hands in front of you or in back of you?

A. In back.

Q. Did you ever request that you be handcuffed in any other way or that you not be handcuffed?

A. No.

Q. Did you ever sustain any injury in connection with those arrests?

A. No.

Q. I take it that as far as Officer -- Sergeant Farrell handcuffing you is concerned, if your arm hadn't already been injured from your view, the handcuffing wouldn't be a problem, right?

A. Correct.

Q. There wasn't anything he did about -- there was not anything that Officer Farrell did as far as the handcuffing procedure itself was concerned that was unusual; is that true?

A. I've never been handcuffed and dropped to my knees before, no.

Q. Well, as far as putting -- your putting your hands behind your back and securing them where the

handcuffs is concerned, Sergeant Farrell handcuffed you in the usual manner; is that true?

A. Yes.

* * *

[p.333]

A. A higher level.

Q. Where on your back was that?

A. It was forced upward from the rear. That's what brought me down to my knee.

Q. Was it equal or beyond the shoulder blades, if you recall one way or the other?

A. It was almost up to the shoulder blade.

Q. Did you consider that a normal way of being handcuffed in comparison with the way you had been handcuffed prior to that time?

A. No.

Q. And what do you consider abnormal or unusual about the way that Sergeant Farrell manipulated your arms?

A. The forcing it up -- upwards while I was complaining about the pain.

Q. Did you feel that there was any need to continue to force your arms upwards?

A. There was no need, no.

Q. Did Sergeant Farrell, prior to -- now, which hand did he grab first to handcuff?

A. My left.

Q. The injured arm?

A. Yes.

Q. And what did he do with that arm?

[p.334]

A. Twisted it back and brought it straight up my

Q. And when he was doing that to your left arm, had he done anything yet to your right arm?

A. No.

Q. As he lifted your left hand behind you, at what point do you feel pain?

A. As soon as he twisted it.

Q. Were you able to manipulate your arm to that position on your own?

A. No.

Q. When I twisted it, and you told him that -- what?

A. I just started yelling and I just said, whoa, wait a minute, wait a minute, what are you doing? What are you doing? Because he didn't even tell me I was under arrest.

Q. Had he seen the prescription bottles prior to that time?

A. Yes.

Q. Had he discussed with you that you had been hospitalized prior to that time?

A. I told him I just got out of the hospital.

Q. Okay. Did you ever indicate to him prior to that time that your arm had been injured in the [p. 335] motorcycle accident?

MR. BRAMS: objection, asked and answered. already answered that question.

MR. BOGAN: Join.

Q. You can answer it.

A. I'm sorry, could I have the question again? (The pending question was read back by the Reporter.)

MR. BRAMS : Same objection.

A. I told him that I was in a motorcycle accident and then he looked -- that's why he asked me, what's this for? And I said, well, I had a motorcycle accident.

Q. Okay. What I'm asking is, did you ever tell him that your arm had been injured in the motorcycle accident?

MR. BRAMS: object to the question; it's been asked and answered.

A. Yes.

Q. Did you tell him that before he handcuffed you?

MR. BRAMS: Objection, asked and answered.

A. No.

Q. Okay. When you complained of pain as he brought your arm behind you, did he stop in any way?

A. No.

* * * * *

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 98-997-CIV-ORL-19A
JUDGE: PATRICIA C. FAWSETT

JOE JOHN RODRIGUEZ, Plaintiff,	)
v.	)
CITY OF WINTER PARK, FLORIDA, a municipal corporation, DOUGLAS M. BALL, WAYNE W. FARRELL, and LOIS SZCZEPANSKI, Defendants.	)

COUNTY OF ORANGE
STATE OF FLORIDA

AFFIDAVIT OF THE PLAINTIFF JOE JOHN RODRIGUEZ

CAME BEFORE ME the undersigned authority, this 2nd day of August, 1999, the person of JOE JOHN RODRIGUEZ, personally known to me, who after being duly sworn did upon his oath depose and state that the following facts are true and correct:

Affidavit of Joe John Rodriguez, 8/2/99

1. On the date of my arrest by the Winter Park Police Department, September 8, 1995, I had recently been discharged from the hospital (8/29/95) due to a serious motorcycle accident that occurred on July 9, 1995.

2. Immediately prior to my arrest I was dressed in long sleeved sweatshirt with my left arm bandaged underneath, and I was sitting in the front passenger seat of a car driven by a friend of mine, Patricia Foulkes, who was taking me to my home in the City of Winter Park, coming from Lakeland.

3. When I was in the vehicle, I had my left arm in a padded hospital sling which had a strap around my neck. I also had a small pillow under the arm, upon which the sling rested.

4. At the time my weight was down from my normal "200 - 210 Ibs" to between 180 - 190 lbs.

5. My height was and is 5'11", my eyes are brown, I have no facial scars.

6. I had 6 tatoos at the time, as follows:
biceps:
right: "Life's a Beach"
Left: picture of a Phoenix bird

shoulder blades:
right: "New York"
left: "Florida"

ankles:
right: picture of iguana
left: beach scene with palm tree

7. I was born on 3/23/53 in the Bronx, New York. I have always used my birthname of Joe (John) Rodriguez, and none other. My social security number is: 115-42-5388.

8. In 1985 1 was sentenced to three years in the Florida prison system on bad check charges.

9. On the morning of the arrest on September 8, 1995, Ms. Foulkes was driving her vehicle, and was stopped at approximately 12:10 a.m for a tag light that was supposedly not working by Officer Szczepanski of the Winter Park Police Department.

10. Officer Szczepanski had Ms. Foulkes exit, and then asked Ms. Foulkes if she could search the car, and Ms. Foulkes said yes. Officer Szczepanski then walked around to the passenger side of the vehicle I was in, leaned down, and looked into the car. She asked me to hand her Ms. Foulkes' purse. I reached across the seat with my right hand, and handed it to her through the passenger side window. She then asked me to exit, before she looked through the purse. Officer Szczepanski would have been able to see my sling when she looked at me in the ear. I took the sling off before exiting the car.

11. When I got out of the car, Officer Szczepanski was involved with searching the purse Patricia Foulkes,

and placed her into Sgt. Farrell's police unit. Thereafter, Officer Szczepanski began to search the car, and continued to do so even after I was handcuffed by Sgt. Farrell.

12. All communication between the police and myself Were with Sgt. Farrell. Officer Szczepanski never spoke to me other than having me hand Ms. Foulkes' purse to her while I was inside the vehicle, and then asking me to exit. Prior to my arrest, Officer Szczepanski did not handle any of my identifications, or my belongings. Only Sgt. Farrell did this. Moreover, all radio communications prior to my arrest were done by Sgt. Farrell.

13. Sgt. Farrell was already on the scene while I was still in Ms. Foulkes car, and before I handed the purse to Officer Szczepanski. He made all the radio communications, and received all the radio communications. Officer Szczepanski was still engaged in the search of Ms. Foulkes' car at the time of my arrest, and was still inside the vehicle doing the search.

14. When Sgt. Farrell first approached me, Ms. Foulkes was already arrested, and in the back of Sgt. Farrell's police unit. He came up to me while I was outside the car and asked where I was coming from.

15. I told him: "Lakeland"
He asked ifI had any identification.
I told him I did -- it was in my bag (a backpack type bag).

He took the bag, and asked me if he could look inside it, and I said "OK"
I told him my drivers license was in my "clutch" inside the bag.
He opened the clutch, and took out my Florida Driver's License.
He then radio'd in my name and driver license number
He then started looking through my backpack bag
He took out my prescription medication bottles, and lined them up on the trunk of Ms. Foulkes' vehicle.
He then took a quick look through my hospital records from the motorcyole accident which I had in the backpack bag in an open folder.
He asked me what the prescription bottles were for, and if they were mine.
I told kim they were mine, that I just got out of the hospital, and had had a motorcycle accident.

16. Sgt. Farrell then put my medical records, the prescriptions, and my clutch back into the backpack bag, leaving everything on the trunk of the vehicle.

17. I then heard a female voice come over the radio saying: my name, my address, and then "no wants or warrants"

18. My clutch, which is a black zippered case with brown trim, approximately 8" x 10", contained a number of identifications, many in plastic windows. The identifications in the clutch included:

Fla. Driver License application
Florida Drivers License

two Florida. Hunting/Fishing Licenses --- (showing Weight of 207 and 223 lbs)
daily diary
Social Security Card
Chilis Frequent Diner card
Orange County Library Card
Birth certificate
Various business cards of others, photos, religious card, etc.
Kash n' Karry Preferred Customer Card
Pepsi License to Chill card
First Union Visa card
Blockbuster Video card
Gooding's Family Video Store card
Veteran's Administration Patient Data Card
Armed Forces Discharge Papers (copy)
Letter from Bank (First Union) of overdraw to "Joe J. Rodriguez"
U-Haul contract with Joe Rodriguez
Master Card receipt

19. Sgt. Farrell then walked away from me, and said something into his radio. I waited, and about one to two miuutes later he approached me, and asked me how tall I was. I said 5'11". He said, hewas that height, and I couldn't be 5'11". I pointed out to him that he was standing on an incline, and that's why he may have seemed taller. He then asked if I had any tatoos. I said yes. He asked asked "how many". I said "six". He said: "do you have four". I again said I had six. He said, "but do you have four?" I said: "in order to have six, you have to have four." Sgt. Farrell then asked where they were.

20. I took my left hand, and touched my right bicep, saying: "I have one here", and then I took my right hand, and touched my left bicep, and said "I have one here". At that point, without warning, Sgt. Farrell grabbed my left arm from behind me, and twisted it up behind me against my shoulder blade. I immediately fell to my knees in pain, and yelled in pain asking him "what are you doing?", and repeatedly told him to "stop", "wait a minute" and that he was "hurting me".

21. He said: "Stop resisting". I replied, I wasn't resisting-- and that he was hurting me. At the same time I was saying this, he was pulling my right hand behind me, and handcuffed me. He then pulled me up by.the arm.

22. I was continuing to yell that he was "hurting me", and grimacing in pain. He then said: "We've got you, Victor Herrara", and told me they had 3 warrants on me from St. John's County. I asked where St. John's County was, and he said it's in St. Augustine. I said I'd only been to St. Augustine once in.my life, not too long ago. I also asked him: "who's Victor Herrara?" He said: "You're Victor Herrara, using the alias of Joe Rodriguez". I said: "You're making a big mistake. I'm not Victor Herrara." He then said: "You're Victor Herrara, today, buddy."

23. I continued to complain that he was making a mistake, and asked him to check out my fingerprints or compare me to this Victor Herrara's mug shot. He said he would do that "at the station". I continued to groan in pain, and Sgt. Farrell then placed me,

handcuffed behind my back, into the same unit as Patricia Foulkes. We were both in the back seat together. I continued groaning. Sgt. Farrell ignored my pain, and distress.

24. Sgt. Farrell then went back to Ms. Foulkes' car where Officer Szczepanski was located, and had a discussion with Officer Szezepanski, and another man who was not in uniform who had been riding in Officer Szczepanski's unit.

25. After their discussion, Sgt. Farrell placed my bag into the trunk of Ms. Foulkes vehicle, returned to his patrol unit, and got in. I was still groaning in pain. He didn't ask me why I was groaning, or why I was in pain. I told him I needed my bag, because I needed to take my medication. He said "don't worry, we'll get your bag", and then drove us to the police station which was only a few blocks away.

26. When we got to the police station I was still groaning in pain as I exited the vehicle. The only officer involved in our custody at the time was Sgt. Farrell. I did not see Officer Szczepanski. I asked for my bag, and told him I "needed my medication", and it had to come with me. I told him I had to take my anti-biotics, and pain medication. He again told me not to worry about the bag, and that the other officer was bringing it. Ms. Foulkes and I were then brought into the station, and I was taken to a holding ceil. My handcuffs were temporarily removed. I continued to complain about pain, and told Sgt. Farrell that I was in "real bad pain". I also told him he was making a "big

mistake", and asked if he could please check the fingerprints and mug shot of Herrera. He again told me not to worry, and that he would "check it out".

27. At that point Officer Szczepanski, and the other gentleman arrived, and she placed Ms. Foulkes into a holding cell.

28. Nobody ever looked at my tatoos at any time. Nobody asked me to describe them. Other them the positions of the two tatoos on my biceps that I pointed to-nobody ever asked the location of the other tatoos. Sgt. Farrell never gave me any indication he was going to arrest me before grabbing my left arm, and never told me I was under arrest at any time, although it was obvious once he handcuffed me.

29. While in the holding cell I continued to protest that there was a mistake, and asked for a fingerprint and mug shot comparison to the only person in the area--the man who had been with Officer Szczepanski at the scene. I did not see either Sgt. Farrell or Officer Szczepanski again.

30. The next person I saw after this was the officer who transported me to the jail.

FURTHER THE AFFIANT SAYETH NOT

/s/_____
Joe John Rodriguez

SWORN TO and Subscribed before me, the undersigned authority this 2nd day of August, 1999.

/s/_____
Tracy R. Duncan
Notary Public
My Commission expires February 27, 2001

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 98-997-CV-19A

JOE JOHN RODRIGUEZ,
Plaintiff,

v.

CITY OF WINTER PARK, a municipal corporation, DOUGLAS M. BALL, WAYNE W. FARRELL, and LOIS SZCZEPANSKI,
Defendants.

AFFIDAVIT OF WAYNE W. FARRELL

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, this day personally appeared the Affiant, WAYNE W. FARRELL, who after being first duly sworn, deposes and says:

1. That my name is Wayne W. Farrell. I am over 18 years of age, of legal capacity to testify, and have personal

knowledge of the pertinent facts contained herein.

2. That I am a sergeant employed by the City of Winter Park, Florida Police Department. I have been employed full time by the City of Winter Park Police Department since January, 1986. On September 8, 1995, when the arrest of Plaintiff, JOE JOHN RODRIGUEZ, occurred, I had attained the rank of sergeant. My actions in connection with the arrest of JOE JOHN RODRIGUEZ occurred within the course and scope of my employment as a police officer with the City of Winter Park.

3. That in the early morning hours of September 8, 1995, I served in a backup capacity to Officer Lorri Szczepanski, in connection with a motor vehicle traffic stop (involving a vehicle driven by Patricia Foulkes, in which Joe Rodriguez was a passenger) that took place in Winter Park, Florida. I was not involved in the initial stop of the Foulkes' vehicle, but arrived at the scene later. Mr.Rodriguez was properly questioned due to lfis presence at the scene of a drug related arrest and his possible connection to the drugs. Mr. Rodriguez voluntarily spoke with us.

4. That I assisted Ofc. Szczepanski and conferred with Ofc. Szczepanski in connection with this arrest. The arrest of Joe Rodriguez was made under the authority of Ofc. Szczepanski.

5. That the individual who occupied the Foulkes' Vehicle identified himself as Joe Rodriguez. We were advised by the dispatcher, who had access to teletype information provided by the St..Johns County Sheriff's Department, that there was a warrant outstanding for Victor Heredia who used an aka or

alias of Joe Rodriguez. The following information was available, or became available, in connection with the description or characteristics of Victor Heredia aka Joe Rodriguez and the individual named Joe Jolm Rodriguez who is the Plaintiff in this ease. That information is contained on the following chart:

Victor Heredia a/k/a Joe Rodriguez

Name:	Victor Manuel Heredia a/k/a/ Joe Rodriguez
Sex:	Male
Race:	White (Hispanic)
Date/Birth:	6/24/53, 7/2/53 6/23/53 (multiple)
Place/Birth:	New York
SSN:	112-42-9808, 112-42-5808 and 112-43-9809 (multiple)
Height:	5'6"
Weight:	139
Hair Color:	Brown
Eye Color:	Green
Tatoos:	4 (various areas)
Eyeglasses:	Yes
Residence:	St. Augustine, FL
Type/Offense	Traffic (vehicle)/drugs

Plaintiff, Joe John Rodriguez		Similarities
Name:	Joe John Rodriguez	x
Sex:	Male	x
Race:	White (Hispanic)	x
Date/Birth:	3/23/53	x
Place/Birth:	New York	x
SSN:	115-42-5388	x

Height:	5'11"	
Weight:	I recall Plaintiff as relatively slender but have no specific estimate of his weight	x
Hair Color:	Dark Brown	x
Eye Color:	Dark Brown	
Tatoos:	6 (various areas)	x
Eyeglasses:	No recollection. It is my understanding that he has glasses but does not always wear them	x
Residence:	Apopka, FL (although indicated he had been in St. Augustine	x
Type/Offense	Driver of vehicle in which he was occupant arrested on drug charge	x

Although it was not my decision to arrest Joe Rodriguez, I concurred in the decision to arrest him. In my view, there was arguable probable cause, and actual probable cause, under all the circumstances that existed at the time, to support this arrest. There are a number of identical or substantially similar features, characteristics or other information between Victor Heredia aka Joe Rodriquez, on one hand, and Joe Rodriguez, the Plaintiff in this case, on the other hand. The chart contains an "x" to mark those features or other information. As noted, the identical or similar characteristics include name, gender, ethnic background, place of birth, date of birth (same year), Social Security number, hair color, and contact with venue of the warrant. Also, Victor Heredia aka Joe Rodriguez was wanted on a drug related charge, and the Joe Rodriguez standing before me was the occupant of a vehicle the driver of wlieh had just been arrested on a drug related charge. Any

differences between the identifying information relating to these two individuals were either minor or inconsequential in nature or, in the overall context of matters, would not change the determination of probable cause. It is common for there to be some differences in identifying information and in my experience the officer must make a determination of probable caused based upon the totality of circumstances. The decision concerning the arrest needed to be made, "on the street", in the early hours of the morning. Based upon all of the information then reasonably available, I believed, and still believe, that there was arguable and actual probable cause for the arrest of Joe Rodriguez. The decision to arrest Joe Rodriguez was clearly an appropriate decision properly within the discretion of the law enforcement officer on the scene.

6. Mr. Rodriguez has claimed that he had sufficient additional identification, above and beyond a Florida driver's license, to establish his identity as Joe Rodriguez, and not Victor Heredia. I do not recall all of this documentation being present, but I have reviewed the alleged documentation. In my view, as an experienced law enforcement officer, the identification in question is not of great significance and does not alter the determination that arguable and actual probable cause existed for the arrest of Mr. Rodriguez. The identification in question constituted forms of"identification" that are not reasonably considered to be valid and reliable identification (such as video store identification cards, grocery store cards, dinner discount cards, fishing license etc.) and, furthermore, the existence of multiple pieces of identification, in the name of an alias (in this case Joe Rodriguez) does not establish the true identity of an individual. In fact, in my experience, an individual using an alias may actually collect a number of pieces of "identification" using the alias in order

to establish his or her new "identity".

7. I am 6 feet tall. It appears to me that Mr. Rodriguez was shorter than me, probably by several inches. That was my impression at the time.

8. That as indicated, a determination was made that there was probable cause, based on the information then reasonably available to arrest Joe Rodriguez. Once probable cause existed, the decision to arrest Mr. Rodriguez was within the lawful discretion of the officer at the scene. Other agencies or parts of the judicial administration system may be involved in resolving questions concerning identity. It is my experience, though, that the officer at the scene, with the resources available to that officer at the time, must make a determination concerning probable cause, and the ultimate validity of that determination will be tested at a later time. We were not in a position to make any further determination concerning the identity of Mr. Rodriguez, but, rather, made a decision based upon information reasonably available at that time.

9. That I was the law enforcement officer who actually placed handcuffs on Joe Rodriguez. Ofc. Szczepanski was not involved in handcuffing him. I handcuffed Mr. Rodriguez, with his hands behind him, pursuant to Department policy, and in order to minimize any risk of harm to an officer or the public. Prior to commencing to handcuff Mr. Rodriguez, he made no mention of any injury to his elbow or arm or any problem in that regard. I did not notice any sling bandage or similar device on or supporting his arm or elbow. As I was in the process of putting Mr. Rodriguez's left arm behind his back, he stated that his arm had been injured and that I should be careful. He never asked that he not be handcuffed or that

he be handcuffed with his hands in front of him. As I was putting his wrists behind him, in a routine manner, Mr. Rodriguez said "Oh," but never yelled or moaned in pain. He never asked that the handcuffs be removed or that he be handcuffed in any other manner. He never indicated that he was in need of any medical attention. I placed and secured his hands behind his back in a routine fashion and in a normal handcuffed position. I never jerked or forced Mr. Rodriguez's wrists towards his upper back or shoulder. I never forced Mr. Rodriguez to the ground. Mr. Rodriguez's legs or knees never buckled and he never fell to the ground. Quite simply, the handcuffing of Mr. Rodriguez was fairly routine. He asked me to be careful, I was careful, and he never asked me to stop handcuffing him, release him from the handcuffs, or handcuff him with his hands in front of him.

10. That I believe that all of my actions in connection with Joe Rodriguez, relating to questions concerning his identification and relating to the handcuffing of the arrestee, were proper and objectively reasonable under all the circumstances. I believed then and believe now that all of my actions were fully consistent with clearly established law. At the time of the arrest of Mr. Rodriguez, I had every reason to believe that his arrest, and the method by which he was handcuffed, was lawful in all respects. I acted in good faith and within my proper and lawful discretion as a law enforcement officer.

FURTHER AFFIANT SAYETH NAUGHT.

STATE OF OHIO
COUNTY OF ORANGE

BEFORE ME, the undersigned, duly authorized to take acknowledgments in the State and County aforesaid, personally appeared WAYNE W. FARRELL, personally known to me to be the person designated in the foregoing, or who has produced a driver's license as identification, and who acknowledged before me that he executed the same freely and voluntarily for the purposes described therein.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 6th DAY OF MARCH, 2000.

s/s_____
Angela C. Garcia

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

(4)

No. 02-651

In the

Supreme Court of the United States

Joe John Rodriguez

Petitioner

vs.

Wayne W. Farrell, and Lois Szczepanski

On Petition for Writ of Certiorari
To the United States Court of Appeals for
the Eleventh Circuit

REPLY BRIEF OF PETITIONER AND APPENDIX in response to RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

ARGUMENT

THE BRIEF IN OPPOSITION FAILS TO ACCURATELY SET FORTH THE FACTS BELOW

With all due respect to the Respondent's Brief in Opposition, their Statement of Facts is materially inaccurate, misleading, and is directly rebutted by portions of the testimony set forth in their Appendix. Moreover, it omits material and substantial facts supplied in the depositions of the Petitioner's surgeon, Dr. Cole, and Petitioner's police procedures expert, Professor White, both of which were before the lower courts. For instance, Professor White testified in deposition that the handcuffing technique was not typical as there was no need whatsoever for application of a "pain compliance" technique, and that normally accepted procedure would have been to advise Mr. Rodriguez he was under arrest, and ask him to turn around to be cuffed. This would have been consistent with Florida Statute 901.16, as well as the regulations of the Winter Park Police Department. He also testified it would not have been consistent with accepted police procedures to continue the handcuffing once Mr. Rodriguez screamed in pain, and that an objectively reasonable officer would have been under the obligation to stop the handcuffing, make inquiry, and call for medical assistance until the situation was determined. He also explained several equally effective methods of handcuffing an injured person which would not have caused injury, whatsoever. Dr. Cole, on the other hand, testified

that the mere placing of the Petitioner's arm behind his back would have caused such substantial pain, that he would have expected the Petitioner to "scream" if it occurred, and that the longer the handcuffs were applied in this situation – the more complications that would have occurred to the internal hardware, and fixation of the healing bone fragments because of the continued pressure.

Likewise, although Sgt. Farrell denied that the Petitioner showed any discomfort or pain throughout the incident, the evidence (in the light most favorable to the Petitioner) still established that:

1. For at least thirty minutes prior to the handcuffing the Petitioner had been completely cooperative, and did not even try to leave the scene, although he was not under arrest.

2. Sgt. Farrell had been told prior to the handcuffing that the Petitioner just got out of the hospital due to a motorcycle accident.

3. Although Sgt. Farrell claimed he did not remember being told of the motorcycle accident, he did remember that the Petitioner told him before the handcuffing to be careful of his arm, and while being handcuffed that he had an injury.

4. Sgt. Farrell had briefly looked through the Petitioner's hospital records.

5. Sgt. Farrell had looked at, and handled the Petitioner's prescriptions, and been advised they were for pain, and to prevent infection.

6. The Petitioner screamed in pain immediately upon the start of the handcuffing, and fell to his knees screaming that his arm was being hurt.

7. Rather than advising him he was under arrest, Sgt. Farrell roughly grabbed the Petitioner's arm, and without warning immediately began twisting it up to the shoulder blade, trying to move it higher, to a point beyond where the arm could not go.

8. Thereafter. the Petitioner continuously complained of pain, moaning and grunting throughout the ordeal that he was in "real bad pain".

9. That the Petitioner was then kept handcuffed in the back of the police car for at least ten minutes before Sgt. Farrell headed back to the police station (a five minute trip), and thereafter, at the police station he was kept in handcuffs for another ten minutes, or so. Thus, he would have been handcuffed for a minimum of 25 minutes – all the time without any medical

treatment, while moaning and groaning in extreme pain, and complaining about the pain.

10. Contrary to the Respondent's Brief in Opposition – the Petitioner's medication was never given to him. There is nothing in the record that even remotely suggests this occurred, and this unsupported assertion is flatly contradicted by testimony in the Petitioner's deposition.

11. That throughout the incident, even during the handcuffing, the Petitioner did not resist in any manner, whatsoever.

CONCLUSION

Petitioner respectfully submits that once there is a reasonable basis to conclude that a non-resistive and compliant suspect is being injured by handcuffing to an extent greater than the minor discomfort that might ordinarily be expected, the Constitution requires an officer take some reasonable steps to access and attempt to remedy the situation, rather than ignore the obvious, especially where that conduct amounts to the equivalent of torture – unless an exigency exists.

The cases heretofore recited by the Petitioner in his Petition for Writ of Certiorari show that this position constitutes the weight of authority within the Federal Circuits, and that the current case stands in stark conflict to that case law, as well as the Opinions of this Honorable Court. See

also, Turek v. Saluga, 47 Fed. Appx. 746 (6th Cir. 2002)(copy attached in Appendix, infra).

Respectfully submitted:

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FBN: 147055

APPENDIX

Statutes and regulations:

Florida Statute 901.16
Method of arrest by officer by a warrant:

"A peace officer making an arrest by a warrant shall inform the person to be arrested of the cause of arrest and that a warrant has been issued, except when the person flees or forcibly resists before the officer has an opportunity to inform the person, or when giving the information will imperil the arrest. The officer need not have the warrant in his or her possession at the time of arrest but on request of the person arrested shall show it to the person as soon as practicable." [Accord, Winter Park Police Department Procedure 106-1].

Winter Park Police Department Procedure 106-4:

"Purpose: To process a person arrested for an offense.

Procedure: "Upon arresting a person for any offense:

Arresting Officer:

1. Inform individual arrested of your authority and the cause of the arrest, except:

    a. When the person to be arrested flees or forcibly resists before the officer has the opportunity to inform him, or

b. When giving the information will imperil the arrest.

2. Use only that force as prescribed by law to overcome resistance to a lawful arrest.

3. Search prisoner(s).

4. Properly handcuff prisoner(s). . . . .

(remainder of regulation omitted as not pertinent)

==========

CYRIL TUREK, Plaintiff-Appellee, Cross-Appellant, v. JEFFREYSALUGA, Defendant-Appellant, Cross-Appellee, RANDALL WELLINGTON, Mahoning CountySheriff, et al., Defendants.
Case Nos. 01-3986, 01-4018

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

47 Fed. Appx. 746; 2002 U.S. App. LEXIS 20431

September 24, 2002, Filed

NOTICE:

[**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS.

PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

JUDGES: BEFORE: KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

OPINION BY: ALICE M. BATCHELDER

OPINION: [*747]

ALICE M. BATCHELDER, Circuit Judge. Defendant-Appellant Jeffrey Saluga ("Saluga") and his fellow defendants appeal the district court's denial of their motion for summary judgment, based on qualified immunity, against the 42 *U.S.C. § 1983* excessive force claim of Plaintiff-Appellee Cyril Turek ("Turek"). Turek cross-appeals the district court's[**2] dismissal of his state law false arrest and false imprisonment claims. Because the district court correctly concluded that summary judgment was inappropriate and because we have no jurisdiction to consider Turek's cross-appeal, we will affirm the judgment of the district court.

Statement of Facts n1

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n1 Though there are a number of factual disputes in this case, we present here only the facts as viewed in the light most favorable to Turek. See *Williams v. Mehra, 186 F.3d 685, 689 (6th Cir. 1999)* ("The issue on appeal [of a denial of summary judgment for qualified immunity] is not what facts the parties may be able to prove, but whether the plaintiff's facts, taken at their best, show a violation of clearly established law.") (citing *Johnson v. Jones, 515 U.S. 304, 311, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995)).*

Turek and his wife Candace were divorced in November of 1998. The final divorce decree authorized Candace temporarily to have exclusive possession of the Mahoning[**3] County farm that they had jointly owned, though the decree also granted Turek leave to enter the property "for purposes of conducting his farm business and for emergency purposes." Turek's "farm business" was to maintain and feed twice daily the denizens of his barn: [*748]forty chickens, ten cats, eight ducks, seven pigs, three horses, two donkeys, two dogs, and a calf. Though the decree entitled Candace to reside on the property until July 30, 1999, by June of 1999 she had moved out, into an apartment. The decree provided that Candace would sell her interest to Turek by July 15, 1999; it also gave Turek the right to immediate possession once Candace was no longer using the property as her primary residence, but he opted not to exercise this right because of legal formalities involved.

On the hot evening of July 21, 1999, Turek arrived at the farm at around 9:40 p.m.--his first visit to his animals for the afternoon feeding. At the farm he was surprised to find a party underway: ten cars were in the driveway of the house, the doors of the house were open, and inside his 19 year-old son "C.J." was drinking beer with a number of his under-age friends. Turek told them they would have to leave; [**4] when they refused, he called the Mahoning County Sheriff's office and reported that minors were drinking alcohol on his property. (Turek himself had had nothing to drink, nor did he then.) C.J. then called Candace, who soon afterward arrived and found Turek in the barn feeding the animals.

Officer Saluga arrived about two minutes later, at 10:15; Turek met him in the driveway and asked him to break up the party. Saluga told Turek that he wanted to talk to Candace, and while Saluga returned to the house, Turek resumed his feeding chores. Candace presented to Saluga a copy of the divorce agreement, explaining that she had the exclusive right to reside in the house, that Turek had already been to the barn earlier in the day and had completed his farm work then, and that he had come back only to drink and to harass her and C.J.

Saluga returned to the barn and told Turek that he had to leave immediately, and though Turek offered to show him the divorce papers and said he would leave as soon as he finished feeding the animals, Saluga was not satisfied, telling Turek that according to Candace he had

already fed the animals at 5:00 that afternoon. Turek explained that this was incorrect--that[**5] he had been on his way back from Ashtabula at that time, and that because of the heat it was imperative that he take care of the animals before he left--but Saluga nonetheless told him that he had to leave then or be arrested. Saluga later admitted that he had understood that Turek was one of the owners of the property (though he was in fact at this time the sole owner); that his understanding was that if Turek was the owner, he would have the right to order the teenagers off the property; that there was nothing in the decree that set a time limit for Turek's farm work; that neither Candace nor C.J. had indicated that Turek had threatened them; that Turek had not threatened him personally, nor had Turek done anything violent; that he had not been concerned for his personal safety; and that he had not seen Turek drinking, nor did Turek lose his balance or fall down, nor did Turek act in a way indicating that he was on drugs.

Saluga then arrested Turek, though he first asked him whether there was "anything wrong" with him. Turek told him that he had nerve damage in his right arm and shoulder, and that Saluga should handcuff him in the front and not in the back. Saluga told him that[**6] handcuffing in front was against department policy, and proceeded to handcuff him from behind--Turek offering no resistance. Turek immediately told Saluga that the cuffs were too tight and that his arm was hurting, but Saluga was impassive and led Turek up the driveway

while holding the chain between the cuffs--Turek continuing to complain [*749]that they were too tight and his hands were numb.

Saluga had Turek sit on a rock near his car (because Saluga had a police dog inside the car), while he talked with Candace--Turek again calling out in vain about the tight cuffs to the officer, who was about ten feet away. After a while another police car arrived and the officers loaded Turek in, though they had him sit in the car for some time while they talked with Saluga. They, too, ignored his complaints about the cuffs, and they left Saluga's cuffs on Turek until they arrived at the station. Turek spent several hours in jail and then was released on bond.

By the time the officers removed the cuffs from Turek at the station, both his hands were completely numb. The feeling in his left hand began to return while he was still at the station, but when the feeling in his right hand did not return[**7] even after several weeks and the hand proved unusable, he contacted a neurologist and was scheduled for an appointment in August. The neurologist indicated that the cuffs had caused a new neurologic injury to the ulnar nerve of Turek's right wrist, resulting in the loss of function to his right hand. Turek continues to have significant disability and loss of function with his right hand.

I. Qualified Immunity for Excessive Force in Handcuffing

We review de novo an interlocutory appeal of a denial of summary judgment predicated on a claim of qualified immunity. *Mattox v. City of Forest Park, 183 F.3d 515, 519 (6th Cir. 1999).* The first question is whether the facts alleged, taken in the light most favorable to Turek, show that Saluga violated a constitutional right. *Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001).* We have held that the right to be free from excessive force is a Fourth Amendment right, and that an excessive force claim may be based on handcuffing. See *Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993)* ("An excessive use of force claim could be premised on [the[**8] officer's] handcuffing [the plaintiff] if he knew that she had an injured arm and if he believed that she posed no threat to him."). n2 Hence the question turns to whether Saluga's alleged actions violated that right. Turek alleged that he posed no threat to Saluga, that he had nerve damage in his right arm and shoulder, that he communicated this to Saluga, and that Saluga nevertheless handcuffed him too tight and refused to loosen the handcuffs when requested. This sufficed to establish a violation of Turek's constitutional right not to be subjected to any objectively unreasonable use of force.

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n2 Saluga argues that Walton is no longer good precedent, because in Walton we did not conduct the reasonableness inquiry that the Supreme Court later required in Saucier, and instead concluded that summary judgment was

inappropriate because there was a material issue of fact regarding whether the officer in fact used excessive force. See *Walton, 995 F.2d at 1342.* Nevertheless, though Saucier modifies this part of Walton, it does not disturb our finding in that case that an excessive force claim can be premised on handcuffing.

The next question is whether this right was clearly established--that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier, 533 U.S. at 202.* This in turn compels us to give careful attention to the facts and circumstances of this particular case, including the severity of Turek's allegedly criminal activity, whether Turek posed an immediate threat to Saluga's safety, and whether Turek actively resisted arrest or attempted to evade arrest by flight. See *Graham v. Connor, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 109 S. Ct. [*750] 1865 (1989).* We must also ask whether even if Saluga made a mistake, that mistake was nevertheless reasonable given what he knew at the time. *Saucier, 533 U.S. at 206.*

Viewing the facts in the light most favorable to Turek, we find that Saluga knew that Turek had an injury because he asked him about it, Turek described his injuries and asked Saluga to handcuff him in front, and Turek complained about the tightness of the handcuffs. Additionally--looking to the Graham factors--Turek's "crime" was not severe, he posed no threat to Saluga's safety, [**10] and he made no attempt to resist the arrest. Though Saluga

correctly told him that it was against department policy to handcuff in front, the Mahoning County Sheriff's Policy Manual also provided an exception: "All persons taken into custody shall be handcuffed with their hands behind their backs. Where the health and safety of the suspect might be compromised, the suspect may be handcuffed with the hands in front." In light these facts, which for purposes of the summary judgment motion we presume to be true, we find that Saluga's conduct given what he knew at the time was not reasonable, and the district court properly denied summary judgment.

II. Jurisdiction over Cross-Appeal of Dismissed State Law Claims

Turek requests that we consider his cross-appeals of his false arrest and false imprisonment claims that the district court dismissed, and invokes the collateral order doctrine and pendent appellate jurisdiction. Fed. R. Civ. P. 54(b) additionally allows a district court to enter final judgment prematurely under special circumstances (thus permitting an immediate appeal of the issue), but the district court did not do so in the present case.

In *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949)[**11]* the Supreme Court created the collateral order doctrine--a narrow exception to the final judgment rule for a "small class" of prejudgment orders. *Id. at 546.* The Court has since explained that to qualify, an order must (among other things) "be effectively unreviewable

on appeal from a final judgment." *Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985)* (quoting *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)).* There is no reason why Turek cannot appeal the dismissal of his claims after his case ends in a final judgment, and hence this doctrine does not render his claim reviewable.

Pendent appellate jurisdiction would be appropriate here only if Turek's false arrest and imprisonment claims were inextricably intertwined with his § 1983 claim, or if we had to address the dismissal of the former in order to meaningfully review the latter. *Swint v. Chambers County Comm'n, 514 U.S. 35, 51 (1995).* Though there is some factual overlap between Turek's state law claims and his § 1983 claim, the issues are not nearly inextricable: Saluga could[**12] have used excessive force even if he had a legal reason to arrest Turek, and vice versa.

Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court denying summary judgment.